Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BROWN & WILLIAMSON TOBACCO CORPORATION, AS SUCCESSOR BY MERGER TO THE AMERICAN TOBACCO COMPANY,

Petitioner,

v.

GRADY CARTER AND MILDRED CARTER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Florida Supreme Court's affirmance of a verdict in favor of a cigarette smoker against a cigarette manufacturer where (1) that smoker was permitted at trial to introduce a package insert and expert testimony that such an insert should have been included in cigarette packages to provide additional health warnings to cigarette smokers after July 1, 1969, and (2) the jury was permitted to impose liability on the cigarette manufacturer based on expert testimony that such an insert was required to be included in cigarette packages after July 1, 1969, violated the preemption provisions of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334, as interpreted by *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and the Supremacy Clause of the United States Constitution.

PARTIES TO THE PROCEEDING

The petitioner is Brown & Williamson Tobacco Corporation, as successor by merger to The American Tobacco Company. The respondents are Grady Carter and Mildred Carter.

RULE 29.6 STATEMENT

Petitioner Brown & Williamson Tobacco Corporation, as successor by merger to The American Tobacco Company, has the following parent corporations:

B•A•T Industries, p.l.c.
BATIC Inc.
BATUS Holdings Inc. UK/US
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Limited
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court in the appeal below.

OPINIONS BELOW

The opinion of the Florida Supreme Court (App., *infra*, 1a-25a) is reported at 778 So. 2d 932. The opinion of the First District Court of Appeal of Florida (App., *infra*, 26a-37a) is reported at 723 So. 2d 833. Prior to trial, petitioner filed a motion for partial summary judgment based on the preemptive effect of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331 *et seq*. The trial court denied said motion by an unreported Order dated April 4, 1996. App., *infra*, 44a-47a. The denial by the First District Court of Appeal of Florida of interlocutory review (App., *infra*, 42a-43a) of the trial court's denial of petitioner's motion for partial summary judgment is reported at 680 So. 2d 546.

JURISDICTION

The Florida Supreme Court entered its judgment on November 22, 2000. App., *infra*, 1a-25a. A timely motion for rehearing was denied by the Florida Supreme Court

on January 19, 2001. App., *infra*, 38a-39a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At trial in a products liability action against petitioner, a domestic cigarette manufacturer, respondents were allowed to claim through expert testimony that an insert should have been included in cigarette packages to provide additional health warnings to smokers, including during the time period after July 1, 1969. Petitioner objected to this claim on the ground that the FCLAA prevents the states from imposing any requirement on cigarette manufacturers to provide warnings in cigarette advertising or promotion after July 1, 1969, other than the warnings specifically required by the statute. The trial court ruled, however, that whether the package insert constituted "advertising" or "promotion" within the meaning of the FCLAA was a question of fact for the jury to decide, and not a question of law. These rulings, which the Florida Supreme Court expressly upheld (App., *infra*, 1a-25a), violated Section 5 of the FCLAA, as amended, 15 U.S.C. § 1334, and the Supremacy Clause of the United States Constitution.

Section 5 of the FCLAA, as amended, 15 U.S.C. § 1334, provides:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT

Petitioner is a domestic cigarette manufacturer based in Louisville, Kentucky. Since the mid-1990's, hundreds of lawsuits have been filed by smokers against petitioner and other cigarette manufacturers in Florida and other states. Currently, there are approximately 46 such lawsuits by individual smokers pending against petitioner in Florida, approximately 1,490 such suits pending nationwide against petitioner, and approximately 1,657 such suits pending against various cigarette manufacturers, including petitioner, throughout the United States. In the vast majority of these lawsuits, the plaintiffs allege that the cigarette manufacturer was required to warn the smoker of the health risks of smoking.

Since January 1, 1966, the FCLAA, enacted by Congress in July 1965, has required all cigarette packages sold

in the United States to carry a warning label prescribed by Congress. As amended, § 5(b) of the FCLAA provides, effective July 1, 1969, that: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). Under § 5(b) of the FCLAA, state law tort claims against cigarette manufacturers are preempted, as of July 1, 1969, to the extent that the claims seek to require the manufacturer to provide additional warnings in cigarette advertising or promotions, other than the required package warning. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992) (section 5(b) preempts tort claims based on state law that would "require a showing that [a cigarette manufacturer's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings . . . .") (plurality).

The instant case was the first lawsuit brought to trial by an individual smoker against a cigarette manufacturer in Florida after *Cipollone* was decided. In this case, filed in February 1995, respondents asserted against petitioner causes of action sounding in negligence and strict liability. They alleged, among other theories, that petitioner failed to warn respondent Grady Carter of the health risks of smoking. App., *infra*, 4a. (*See also* Rec. 1:1-11.)

Prior to trial, petitioner sought a partial summary judgment to foreclose claims by respondents that petitioner was required, after 1969, to provide additional or more clearly stated warnings in cigarette advertising or promotion, other than the health warnings mandated by FCLAA. In that motion, petitioner argued that the

FCLAA, as interpreted by this Court in *Cipollone*, expressly preempts any claim based on Florida law that petitioner should have provided additional or more clearly stated warnings about the health risks of smoking after July 1, 1969. (Rec. 2:352-56; 2:362-73; 2:407-25.) The trial court denied petitioner's motion for partial summary judgment, on the ground that the application of the preemption provisions of the FCLAA to respondents' claims was a question of fact for the jury to decide. The trial court held that "a genuine issue of material fact exists regarding the general usage of the terms 'advertising or promotions,'" as used by Congress. App., *infra*, 46a. The First District Court of Appeal subsequently denied petitioner's timely application for interlocutory review of the trial court's decision. App., *infra*, 42a-43a.

At trial, in support of their failure to warn claim, respondents introduced a package insert that was prepared by one of their experts, Dr. Allan Feingold. This proposed package insert contained health warning information far beyond that which is required by the FCLAA. App., *infra*, 48a-54a. Respondents elicited expert testimony from Feingold that this package insert should have been used to warn consumers of the risks of smoking, including during the time period after 1969. Petitioner objected to this evidence on federal law grounds, namely, that the FCLAA, as interpreted by *Cipollone*, expressly preempts any state law claim that it should have provided additional or more clearly stated health warnings about the risks of smoking after July 1, 1969 in cigarette advertising or promotion. (Rec. 45:1157-60.)

These objections were overruled, and respondents' expert testified that his insert should have been included

with all cigarette packages sold to consumers, including packages sold after July 1, 1969:

> This is a document that I did to attempt to answer the question what would be an adequate package insert. What would I expect a product like cigarettes to be sold with. When a cigarette addict buys his or her package of cigarettes and opens the package, what should the addict expect to be confronted with.

(Rec. 45:1153.) Dr. Feingold, respondents' expert, later testified, again over objection based on federal law, that there has never been a package insert that "discusses the dangers of cigarettes in detail" – arguing, of course, that there should be. (Rec. 48:1509.) Later still, respondents' expert reiterated that the insert is what smokers should "be confronted with when they open a package of cigarettes." (Rec. 49:1536.) There was never a limitation, either in respondents' questions or in their expert's testimony, which suggested that the insert was required only in the pre-1969 time period.

Respondents' package insert described the dangers of smoking in great detail. It also contained a graphic "skull and cross-bones" icon because, their expert said, that is a "universal image . . . for very serious danger and death." Respondents' expert explained the contents of the insert to the jury at great length, addressing: (1) the diseases associated with smoking; (2) instructions to smoke fewer cigarettes; (3) information about "addiction"; (4) the effect of quitting on the risk of disease; (5) the harmful effect of smoking on DNA; (6) the dangers of smoking filtered and low tar cigarettes; (7) the identity of carcinogens in cigarette smoke; (8) the need for smokers

to seek medical examination; (9) directions on how to stop smoking; and (10) instructions on how much of a cigarette to smoke. (Rec. 45:1190; 47:1452; 49:1537-46.) Respondents' expert claimed that "each of these items in the message is important for the person to consider before they continue to smoke . . . ." (Rec. 49:1537.)

At the close of the trial, the trial court gave the jury the following instruction:

> The federal law does not limit the liability of [a] defendant against the claim of a failure to warn before July 1, 1969. However, you are not to base any findings of liability on a determination that after July 1, 1969, the defendant should have included additional or more clearly stated warnings in the advertising or promotion of its cigarettes or that the defendant, through its advertising or promotional practices, neutralized, minimized, or undermined the effect of the federally mandated warnings during that time.

App., *infra*, 20a. (*See also* Rec. 66:4133; 67:4213-14.) Through this instruction, the trial court advised the jury that petitioner did not have any duty under Florida law to provide additional or more clearly stated warnings in its "advertising or promotion" of its cigarettes. However, the trial court left it to the jury to decide whether the proposed package insert was a form of "advertising or promotion" within the meaning of the statute. In other words, this jury "instruction" was of no effect because, in violation of federal law, it essentially permitted the jury to determine whether the preemption provisions of the FCLAA applied to the package insert.

The jury returned a verdict in August 1996 for respondents finding, *inter alia*, that petitioner failed to warn of the risks attributable to smoking. A judgment for $750,000 in favor of respondents was entered on August 15, 1996. App., *infra*, 40a-41a. Petitioner subsequently appealed the judgment. The First District Court of Appeal of Florida quashed the jury's verdict, finding that respondents' claims were time-barred. It also ruled, correctly, that the trial court committed reversible error by failing to enforce the preemption provisions of the FCLAA. App., *infra*, 32a-35a.

The First District Court of Appeal directly addressed a federal question when it found that the trial court violated "federal preemption of state causes of action for inadequate warnings" by receiving into evidence respondents' package insert. App., *infra*, 34a. It further ruled that respondents' use of the insert "strongly implied that additional warnings should have been given, without limitation as to time period," *i.e.*, without limiting the admission of the insert and the testimony about it to the pre-1969 era. App., *infra*, 34a-35a. In addition, the District Court of Appeal held that the trial court incorrectly denied petitioner's motion for partial summary judgment on the issue of preemption and improperly allowed the jury to decide the scope of preemption (an issue of law, not fact). App., *infra*, 33a.

On November 22, 2000, the Florida Supreme Court reversed the district court and reinstated the jury's verdict against petitioner, finding that respondents' claims

were not barred by the applicable statute of limitations. App., *infra*, 25a.[1]

In addition, the Florida Supreme Court directly addressed a federal question when it reversed the district court's ruling with respect to the preemptive effect of the FCLAA. As noted above, petitioner, in its pleadings and at trial, as well as on appeal, consistently objected to the introduction of the package insert and to the trial court's ruling that permitted the jury to determine whether that insert constituted "advertising or promotion" within the meaning of the FCLAA.

The Florida Supreme Court addressed these objections, and rejected them, when it found that admission of respondents' package insert was not erroneous and did not violate the FCLAA and *Cipollone*. The court's ruling was based upon the trial court's instruction to the jury that the jury was "not to base any findings of liability on a determination that after July 1, 1969, [petitioner] should have included additional or more clearly stated warnings" in cigarette advertising or promotion. App., *infra*, 20a. The Florida Supreme Court also ruled that the trial court did not err by denying petitioner's motion for partial summary judgment on the ground that a question of fact existed regarding the scope of federal preemption under the FCLAA. App., *infra*, 17a-18a.

The Florida Supreme Court's decision conflicts with this Court's opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and with decisions by other federal and

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[1] Petitioner, of course, does not raise the state law statute of limitations issue before this Court.

state courts, as to whether the FCLAA preempts certain state law causes of action for failure to warn, and accordingly warrants this Court's review. In addition, review is warranted because the Florida Supreme Court permitted a state court jury to determine the scope of federal preemption as set forth in the FCLAA.

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court's ruling upholding the introduction at trial of evidence that petitioner, after 1969, should have provided warnings to smokers by means of a package insert is inconsistent with the FCLAA. This ruling also conflicts with this Court's decision in *Cipollone*, and with the decisions of other federal and state courts. By upholding a verdict in a case where a cigarette smoker suggested that a package warning insert should have been given after 1969, the Florida Supreme Court directly contravened the express preemption provisions of the FCLAA, as interpreted by *Cipollone*. Review should be granted to ensure that where, as here, preempted evidence is erroneously admitted in violation of federal law, no state law verdict can be permitted to stand. Indeed, were the Florida court's ruling here to remain undisturbed, it would lead to the erosion of the Congressional policy underlying the FCLAA: to ensure that commerce is not hindered "by diverse, nonuniform, and confusing cigarette labeling and advertising regulations" regarding smoking and health. 15 U.S.C. § 1331(2)(B).

This Court should also grant review of the Florida Supreme Court's decision because that court allowed a

jury to base a liability finding on an insert that, according to expert testimony, should have been provided after 1969, and concluded that this was harmless error. App., *infra*, 18a. But, it can never be "harmless" error to allow a jury to base liability on a preempted claim in violation of the FCLAA and the Supremacy Clause of the United States Constitution.

At issue before the Florida Supreme Court was the question whether the FCLAA – as a matter of law – prevents the states from requiring cigarette manufacturers to provide, after 1969, package insert warnings to consumers. The Florida Supreme Court side-stepped that legal question, and instead ruled that it was permissible for the jury to decide that legal issue. This ruling is a misapprehension of federal law, and treads impermissibly upon the Supremacy Clause. The evidence and instructions in this case left the jury free to impose liability on a preempted claim. Because the FCLAA, and *Cipollone*, prohibit the imposition of such post-1969 liability, the Florida Supreme Court's decision to allow the jury to find such post-1969 liability violates federal law, and accordingly, review should be granted.

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE FLORIDA SUPREME COURT'S DECISION PERMITTED THE IMPOSITION OF LIABILITY ON PETITIONER FOR FAILING TO WARN OF THE RISKS OF SMOKING, AFTER 1969, BY MEANS OF A PACKAGE INSERT, IN VIOLATION OF THE FCLAA, *CIPOLLONE*, AND THE DECISIONS OF OTHER FEDERAL AND STATE COURTS.

This Court should grant review because the Florida Supreme Court's decision allowed respondents to assert a

claim based on the failure to provide warnings to smokers after 1969 by means of a cigarette package insert. The Florida Supreme Court's ruling is contrary to the express preemption provisions of the FCLAA, and to this Court's decision in *Cipollone*, as well as the decisions of various other courts. The ruling undermines Congress' purpose in enacting the FCLAA: to ensure that the warning requirements with respect to cigarette advertising and promotion are governed by uniform federal regulation.

A. The Cigarette Package Insert Used By Respondents To Impose Liability Upon Petitioner For Failing To Warn Of The Health Risks Of Smoking After 1969 Constitutes "Advertising Or Promotion" Under The FCLAA.

The FCLAA established a comprehensive federal program concerning the advertising and promotion of cigarettes. The FCLAA requires, *inter alia*, that cigarette packages sold or distributed in the United States contain prescribed warnings concerning the health effects of cigarettes. 15 U.S.C. § 1333. The purpose of the statute is to "establish a comprehensive Federal program to deal with cigarette labeling and advertising," under which: (1) "the public may be adequately informed about any adverse health effects of cigarette smoking"; and (2) commerce and the national economy may be protected and not impeded "by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(1) and 2(B). In order to accomplish this purpose, § 5(b) of the FCLAA expressly preempts states from imposing their own warning requirements:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b).

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court considered the extent to which § 5(b) of the FCLAA preempts state common law actions for personal injuries. In addressing that question, a plurality of this Court held that the FCLAA preempts state law tort claims that "require a showing that [a cigarette manufacturer's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings . . . ." *Cipollone*, 505 U.S. at 524 (plurality). As this Court held, the "central inquiry" in determining whether a particular tort claim is preempted under the FCLAA is to determine whether the predicate legal duty "constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law *with respect to [cigarette] advertising or promotion.*'" *Id.* at 523-24 (plurality) (emphasis added) (quoting 15 U.S.C. § 1334(b)).

Undoubtedly, advocating that Florida law required petitioner after 1969 to provide a package insert warning to smokers is an example of a requirement with respect to cigarette "advertising" or "promotion" that is preempted by the FCLAA. The purpose of the FCLAA is to "[protect] the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations," *Cipollone*, 505 U.S. at 514; *see also*

15 U.S.C. § 1331, and the terms "advertising" and "promotion" must be construed in a manner that implements that purpose. *See, e.g., Crandon v. United States*, 494 U.S. 152, 158 (1990) (in interpreting a statute, courts must look to "the design of the statute as a whole and to its object and policy"). The need for uniformity with respect to cigarette packaging is compelling. If labeling and packaging requirements were not uniform among the states, cigarette packages could not move freely through interstate commerce. Because of this need for uniformity, Congress expressly preempted the states from imposing their own packaging and labeling requirements on cigarette manufacturers. *See Cipollone*, 505 U.S. at 514-15; *see also Small v. Lorrillard Tobacco Co., Inc.*, 252 A.D.2d 1, 14, 679 N.Y.S.2d 593, 603 (App. Div. 1998), *aff'd*, 94 N.Y.2d 43, 720 N.E.2d 892, 698 N.Y.S.2d 615 (1999) (preemption of state regulation of cigarette packaging is based on "the need for uniform standards in packaging and promoting nationally advertised products"); *see also Vango Media, Inc. v. City of New York*, 34 F.3d 68, 74 (2d Cir. 1994) (Congress did not intend to allow state ordinance requiring health warnings "to exist side by side with § 1334(b)"); *Taylor v. American Tobacco Co., Inc.*, 983 F. Supp. 686, 690 (E.D. Mich. 1997) (failure to warn claims are preempted, as they would "potentially impose conflicting requirements").

Package inserts are part of the normal methods by which manufacturers communicate with consumers, and must be considered part of "advertising" and "promotion" under § 1334(b). Otherwise, the purpose of the FCLAA – to ensure nationally uniform requirements regarding cigarette packaging and labeling – would be

defeated. Congress obviously did not intend to allow states to impose their own requirements regarding cigarette packaging. Indeed, it would be absurd to construe the FCLAA as intending, and imposing, a uniform national requirement for warnings *on* cigarette packages themselves, but allowing diverse, nonuniform requirements for warnings *in* those same packages. Such a construction would ineluctably destroy the Congressional intent underpinning the FCLAA.

Of course, in this case the Florida Supreme Court ignored whether the package insert was within the FCLAA's definition of advertising or promotion. Rather, as explained in greater detail *infra* at Part II, that court ruled that it was permissible to allow the jury to determine whether a package insert fits within the ambit of "advertising" and "promotion" under the FCLAA (App., *infra*, 17a-18a), even though it is the duty of a court (ultimately, this Court) to protect the Congressional purposes underlying federal law. Thus, there was a complete failure by the court to prevent the jury from assessing liability on the ground that a package insert should have been used to warn smokers after 1969.

Because requiring a package insert after 1969 is a requirement on "advertising" and "promotion" under the FCLAA, and because the jury was left to decide whether such an insert should have been provided after 1969, the Florida Supreme Court's decision upholding the admission of a package insert to support a post-1969 failure to warn claim based on state law is inconsistent with the statutory text of the FCLAA, with *Cipollone*, and with the decisions of other federal or state courts that have addressed preemption under the FCLAA.

B. The Florida Supreme Court's Decision Directly Conflicts With The FCLAA, *Cipollone*, And Established Federal And State Case Law.

The Florida Supreme Court's decision ignores the preemptive effect of the FCLAA on a requirement imposed under state law to provide a post-1969 warning by means of a package insert. The plain language of that statute, and of *Cipollone*, confirms that any claim under state law that post-1969 cigarette "advertising" or "promotion" should have included cigarette package insert warnings in addition to those prescribed by Congress is preempted as a matter of law. As stated in *Cipollone*:

> [Plaintiff's] claims are pre-empted to the extent that they rely on a state-law "requirement or prohibition . . . with respect to . . . advertising or promotion." Thus, insofar as claims under [a] failure-to-warn theory require a showing that [defendants'] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted.

Cipollone, 505 U.S. at 524 (plurality).

The Florida Supreme Court's decision directly conflicts with *Cipollone*, and hence with the FCLAA, because it permitted the admission of a package insert to support a state law failure to warn claim after 1969, where that insert fit squarely within the FCLAA's sphere of cigarette "advertising" or "promotion." Respondents' insert, as noted above, clearly provided "additional" warnings to consumers (App., *infra*, 48a-54a), but was not confined to the non-preempted (*i.e.*, pre-1969) time period. Given the

clear dictates of the FCLAA and *Cipollone*, it was clear error for the Florida Supreme Court to uphold the admission of the package insert into evidence, as well as Dr. Feingold's testimony that cigarette package inserts should have been provided to smokers after 1969, when this insert was a blatant example of "advertising" or "promotion." The Florida Supreme Court's ruling effectively nullifies Congress' intent under the FCLAA by allowing testifying experts to argue, and juries to decide, whether or not warning inserts should accompany cigarette packages after 1969.

Additionally, the Florida Supreme Court's decision to permit the imposition of tort liability upon petitioner for failing to warn, after 1969, of the health risks of smoking via a package insert also contradicts other federal and state cases which have uniformly held that the FCLAA prevents states from imposing any requirement that a cigarette manufacturer provide post-1969 warnings to consumers other than the warnings Congress itself has mandated. "Many Federal and State courts agree that the [FCLAA] preempts all claims by consumers that the tobacco companies failed to disclose information to the public beyond what was required by Federal law." *Small*, 252 A.D.2d at 14, 679 N.Y.S.2d at 603; *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489 n. 9 (1996) (the warning label required by the FCLAA is "the precise warning to smokers that Congress deemed both necessary and sufficient") (Stevens, J.). *See, e.g., Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir.) ("To the extent that plaintiffs' claims are based on fraudulent concealment or a failure to warn after 1969, they are preempted by the Federal Cigarette Labeling and Advertising Act."), *cert.*

denied, 519 U.S. 930 (1996); *Boerner v. Brown & Williamson Tobacco Co.*, 126 F. Supp. 2d 1160, 1170 (E.D. Ark. 1999) ("[P]laintiffs' post-1969 negligence and strict liability claims based upon a failure to warn to the extent they are based upon allegations that defendant's post-1969 advertising or promotions should have included additional or more clearly stated warnings are preempted."); *Crooke v. R.J. Reynolds Tobacco Co.*, 978 F. Supp. 1482, 1485 (N.D. Ga. 1997) ("Any claim regarding the failure of [defendants] to warn Plaintiff of the dangers of smoking cigarettes is preempted by the [FCLAA]."); *Lacey v. Lorillard Tobacco Co., Inc.*, 956 F. Supp. 956, 964 (N.D. Ala. 1997) ("It is precisely this type of claim – that the warnings on cigarette packages and advertising are inadequate – that is preempted by the [FCLAA]."); *Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 418 (S.D. Fla. 1996) ("*Cipollone* confirms that claims related to the 'advertising or promotion' of cigarettes are preempted by the [FCLAA]."); *Griesenbeck v. American Tobacco Co.*, 897 F. Supp. 815, 823 (D.N.J. 1995) ("'A company's attempt to notify its mass market of anything, whether a danger warning or a marketing effort, is considered "advertising or promotion" under the general usage of those terms, and a state cannot impose requirements on such activities without running afoul of the clear language of *Cipollone*.'"); *American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 438-39 (Tex. 1997) (strict liability and negligence claims that post-1969 cigarette advertising and promotional materials should have included additional, or more clearly stated, warnings were preempted); *Cantley v. Lorillard Tobacco Co., Inc.*, 681 So. 2d 1057, 1061 (Ala. 1996) (state law claim for fraudulent suppression against cigarette manufacturers

preempted as claim alleged failure to inform of risks of smoking, which may only be done by manufacturer via advertising and promotional communications); *Small*, 252 A.D.2d at 14, 679 N.Y.S.2d at 603 ("[T]he [FCLAA] preempts all claims by consumers that the tobacco companies failed to disclose information to the public beyond what was required by Federal law."); *DaSilva v. American Tobacco Co.*, 175 Misc. 2d 424, 430, 667 N.Y.S.2d 653, 656 (Sup. Ct. N.Y. County 1997) ("Applying [*Cipollone*] to the complaint herein, the defendants' motion to dismiss the plaintiffs' claims based on a failure to warn . . . after the effective date of the [FCLAA] in 1969 is granted. These claims are preempted.").

In *Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416 (S.D. Fla. 1996), for example, plaintiff alleged that a cigarette manufacturer should have provided additional warnings to consumers through public service messages, seminars, and mailings. The court held that the manufacturer could not be required to provide any warnings in addition to those required by Congress. It interpreted the terms "advertising" and "promotion" broadly:

> Any attempt by Defendants to notify its customers of the dangers of smoking would employ the same techniques as a traditional advertising or promotional campaign, save with the goal of discouraging smoking. Lobbying, seminars, and public service announcements are all undertaken with the effect of promoting and fostering a product or an ideology.

Id. at 419. Plaintiff's claims sought to impose requirements with respect to cigarette advertising and promotion, and were preempted. Under *Sonnenreich*,

respondents' package insert could not form the basis for a post-1969 failure to warn claim.

The court in *Lacey v. Lorillard Tobacco Co.*, 956 F. Supp. 956 (N.D. Ala. 1997), also rejected claims similar to those made by respondents through their expert. Plaintiff in that case alleged that cigarette manufacturers should be compelled to provide additional information about cigarette additives to consumers. The court held that "a plaintiff's claim based upon an alleged duty of defendants to provide to consumers more information regarding smoking and health than is required by the [FCLAA] is preempted." *Id.* at 963. Again, the terms "advertising" and "promotion" were interpreted broadly: "'[a] company's attempt to notify its mass market of anything . . . is considered "advertising or promotion" under the general usage of those terms . . . .'" *Id.* at 964 (quoting *Griesenbeck v. American Tobacco Co.*, 897 F. Supp. 815, 823 (D.N.J. 1995)).

The court in *Lacey* quoted *Griesenbeck v. American Tobacco Co.*, 897 F. Supp. 815 (D.N.J. 1995), another case in which the court rejected additional warning requirements like the ones respondents' expert advocated. In that case, as in *Lacey*, the court held that "[a] company's attempt to notify its mass market of anything, whether a danger warning or a marketing effort, is considered 'advertising or promotion' under the general usage of those terms . . . . " *Id.* at 823.

Other courts, including the Alabama Supreme Court and the Texas Supreme Court, have also held that the FCLAA preempts states from requiring cigarette manufacturers to provide warnings to customers in addition to

those mandated by the FCLAA itself. *See American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 439 (Tex. 1997) ("[T]he 1969 [FCLAA] preempts failure to warn claims based on allegations that post-1969 advertising or promotional materials should have included different warnings."); *see also Cantley v. Lorillard Tobacco Co., Inc.*, 681 So. 2d 1057, 1061 (Ala. 1996).

The Florida Supreme Court's decision permitting evidence that additional warnings should have been included, after 1969, in petitioner's "advertising" or "promotion" directly contradicts the FCLAA, and *Cipollone* and its progeny, because a cigarette manufacturer cannot be required by state law to provide package insert warnings to consumers in addition to the federal warning. This Court should grant review of the Florida Supreme Court's erroneous decision that permitted respondents to violate federal preemption to ensure that this decision is not misused as precedent in Florida, or as persuasive authority elsewhere, to overturn the Congressional intent behind the FCLAA, as recognized by *Cipollone*.

C. The Florida Supreme Court's Attempted Justification For Admission Of The Package Insert Itself Conflicts With The FCLAA And *Cipollone*.

Rather than confront the issue of whether the FCLAA applies to a package insert, the Florida Supreme Court simply, but erroneously, avoided that issue, finding instead that: (1) a jury instruction advised the jury that there was no failure to warn claim after 1969 with respect to cigarette "advertising" or "promotion," but allowed

the jury to determine whether the package insert was "advertising" or "promotion," and (2) Dr. Feingold's testimony did not "focus" on health information available only after 1969. The Florida Supreme Court ruled that these circumstances effectively avoided any implication of federal preemption. App., *infra*, 18a-21a.

However, the Florida Supreme Court's reliance on the jury instruction cannot justify that court's contravention of federal law. The jury instruction advised the jury that there was no post-1969 failure to warn claim regarding "advertising" or "promotion," but improperly left for the jury's determination whether or not a package insert was "advertising" or "promotion." To suggest that this jury charge was sufficient to enforce the preemptive effect of federal law is a *non sequitor*. The instruction merely informed the jury that there is no claim after 1969 that petitioner "should have included additional or more clearly stated warnings in the advertising or promotion of its cigarettes." App., *infra*, 20a. The trial court, however, in a ruling approved by the Florida Supreme Court, held that the application of preemption was a question of fact, and was therefore up to the jury to decide. App., *infra*, 44a-47a. Accordingly, all the jury instruction did was to permit the jury to decide whether or not package inserts were subject to preemption as "advertising" or "promotion." This violates the FCLAA, *Cipollone*, and, as set forth in detail *infra* at Part II, the Supremacy Clause.

The Florida Supreme Court, like any other court, is obligated to enforce the preemption provisions of the FCLAA. As this Court has stated, "[i]t is this Court's responsibility to say what a [federal] statute means, and *once the Court has spoken, it is the duty of other courts to*

respect that understanding of the governing rule of law." Rivers v. Roadway Express, Inc., 511 U.S. 298, 312 (1994) (emphasis added). But the Florida Supreme Court blatantly failed to respect this Court's interpretation, in *Cipollone*, of the FCLAA. Regardless of the jury instruction, the fact remains that respondents submitted proof that a package insert was required after 1969 to warn smokers. Because the trial court left it to the jury to decide the scope of federal preemption, no legal limit was placed on the jury's ability to impose liability against petitioner based on its failure to include respondents' package insert as a post-1969 warning, in violation of the FCLAA and *Cipollone*.

The jury instruction was no substitute for a proper legal ruling that after 1969, a cigarette manufacturer could not be required to use a package insert to provide further warnings to consumers because of the FCLAA. The trial court should have decided this issue as a matter of law, rather than leaving it to the jury to decide whether a package insert could be required, or whether it was preempted. But, that court failed to enforce the preemption provisions of the FCLAA by letting the jury determine the scope of preemption as a question of fact, by permitting respondents to introduce their package insert, and by allowing expert testimony that the insert should accompany cigarette packages without any date limit, decisions that were improperly upheld by Florida's Supreme Court.

The Florida Supreme Court's comment that "juries are presumed to follow the instructions given to them" (App., *infra*, 21a) is beside the point, and ignores the effect of federal preemption. This is not a case in which

the jury simply rendered findings of fact based on instructions regarding the law. On the contrary, the trial court allowed the jury to decide for itself whether post-1969 failure to warn claims based on a package insert were encompassed within the terms "advertising" and "promotion," in conflict with *Cipollone* and every other court that has addressed the issue and resolved it as a matter of law. *See* Part I.B, *supra*.

Additionally, the Florida Supreme Court's statement that post-1969 information contained in the package insert "was not the focus of Dr. Feingold's testimony." (App., *infra*, 21a) likewise fails to give effect to the pre-emption provisions of the FCLAA. The issue is not that particular information in the insert was, or was not, the purported "focus" of Feingold's testimony. Rather, the point is that Feingold was allowed to testify at all that a package insert – especially such an extensive and graphic package insert as he prepared for this litigation – should have been used to warn consumers after 1969, and that the jury was allowed to decide whether this claim was preempted.

Regardless of what information may have been the focus of Feingold's testimony, pursuant to the FCLAA, no cigarette manufacturer can lawfully be required under state law to provide a package insert warning after 1969. The testimony and the insert offered by respondents suggested a post-1969 duty to warn far in excess of the national uniform warning established by Congress during that preempted era, and the jury charge did not prevent the jury from imposing liability on the basis of such a duty.

The FCLAA, *Cipollone*, and the decisions of other courts do not permit a claim that cigarette manufacturers should have provided package insert warnings after 1969. But the trial court erroneously admitted evidence to support such a claim, and then let the jury decide whether the claim was preempted or not, rulings that the Florida Supreme Court approved. The effect of the Florida Supreme Court's erroneous rulings was to permit the jury to impose liability based on a preempted cause of action – in direct violation of federal law, including the clear rulings of this Court. Review therefore should be granted to ensure that this erroneous decision does not threaten or undermine the Congressional intent underlying the FCLAA.

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THE FLORIDA SUPREME COURT'S DECISION PERMITTING A JURY TO DETERMINE THE PREEMPTIVE EFFECT OF THE FCLAA ON A PACKAGE INSERT VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Not only did the Florida Supreme Court uphold the admission of evidence in support of a claim that a package insert was required to provide warnings to smokers after 1969, it also incorrectly approved the trial court's decision to allow the jury to decide whether or not such an insert was subject to federal preemption. App., *infra*, 17a-18a. This decision violates the Supremacy Clause of the United States Constitution, the FCLAA, and the decision of every court that has deemed the application of

federal preemption to be an issue of law requiring judicial determination.

Simply put, it is the court's responsibility, and not a jury's prerogative, to determine the meaning and scope of federal law. The issue of whether the FCLAA's preemption provisions apply to a package insert, or any other type of advertising or promotion, is certainly a question of law for a court, not a jury, to decide. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 214 (1985) ("[T]he question of whether the [state] tort is sufficiently independent of federal contract interpretation to avoid preemption is, of course, a question of federal law."); *Penn Adver. of Baltimore, Inc. v. Mayor & City Council*, 63 F.3d 1318, 1322 (4th Cir. 1995), *vacated on other grounds*, 518 U.S. 1030 (1996) ("The preemption issue rests on a legal interpretation of the federal statute . . . . Our interpretation of the instant issue as involving solely a question of law is also consistent with the procedural posture of the *Cipollone* case before the Supreme Court, *i.e.*, on review of a motion under Federal Rule of Civil Procedure 12(f) to strike the preemption defense as a matter of law."). By receiving respondents' expert testimony and package insert, and then permitting the jury to find liability based on a post-1969 failure to warn claim, the court effectively freed the jury of the constraints imposed by the FCLAA's preemption provisions, or, put another way, from the limitations imposed by the Supremacy Clause.

Prior to trial, petitioner sought partial summary judgment dismissing any claim that additional warnings to consumers were required after 1969. (Rec. 2:352-56.) Respondents opposed this motion. Foreshadowing their use of their package insert at trial, they argued in effect

that a jury is entitled to determine the scope of preemption under the FCLAA, and to require cigarette manufacturers to provide further warnings to consumers through "methods of communication that are the subject of expert testimony." (Rec. 4:478; 4:484-85.) The trial court denied petitioner's motion, finding that there was a genuine issue of material fact "regarding the general usage of the terms 'advertising or promotions'" in the FCLAA. App., *infra*, 46a. In so ruling, the court accepted respondents' argument that the jury was entitled to decide the extent to which the states may require cigarette manufacturers to provide further warnings to consumers.

Article VI of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. It is axiomatic that state law which conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). As this Court stated in *Cipollone*, consideration of issues "arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone*, 505 U.S. at 516 (alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Of course, since the preemptive scope of the FCLAA "is governed entirely by the express language of § 5," the ultimate touchstone of preemption analysis here is the intent of Congress. *Id.* at 517.

The Florida Supreme Court's ruling should not be allowed to stand because it vitiates this vital Congressional intent. As noted, the purpose behind the FCLAA, as stated in the statute itself, is to establish comprehensive federal regulations with respect to cigarette labeling and advertising under which "the public may be adequately informed about any adverse health effects of cigarette smoking," and pursuant to which interstate commerce might not be impeded "by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(1) and (2)(B).

To give effect to this Congressional purpose, its application and interpretation must be assayed by the courts, and ultimately, by this Court – not by a jury sitting in a personal injury case governed by state law. By upholding the trial court's decision to allow a jury to determine the application and scope of federal preemption – indeed, by giving a jury the ability to nullify § 5(b) (App. *infra*, 17a-18a) – the Florida Supreme Court placed into the hands of the fact-finder the responsibility for interpreting a federal law that governs literally thousands of commercial transactions every day. No court – under the banner of "harmless" error – can give to a jury in a civil lawsuit based on state law the power to determine whether, and to what extent, the preemption provisions of the FCLAA apply to state law tort claims and how those provisions should be interpreted. To do so will ultimately lead to a situation where package warning inserts, or some other additional warning in violation of § 5(b), will be required in some states, in some municipalities, or in some courtrooms, but not in others.

This is not what Congress had in mind when it enacted the FCLAA. On the contrary, Congress specifically imposed a uniform national warning requirement with respect to cigarette advertising and promotion. *See* 15 U.S.C. § 1331. Indeed, as the Second Circuit has noted, Congress did not intend to permit state law warning requirements "to exist side by side" with the federal requirements. *Vango Media, Inc.*, 34 F.3d at 74. The FCLAA, by its very terms, is designed to "protect" interstate commerce by removing the possibility that "diverse, nonuniform and confusing" cigarette health warnings will be required by various state and local governmental or regulatory bodies. The Florida Supreme Court's ruling can only upset Congress's policies of national uniformity underlying the FCLAA. Because federal law in the area of cigarette health warnings is supreme, and hence uniform, as Congress intended, the Florida Supreme Court's decision endangers that intent and accordingly violates the Supremacy Clause.

Respondents used expert testimony that a package insert was required to warn consumers of the dangers of smoking to support a claim for failure to warn after 1969. The FCLAA, *Cipollone*, and a body of case law does not permit a claim on those grounds, but the trial judge erroneously let the jury decide whether or not it does, and the Florida Supreme Court approved this ruling. Review is therefore warranted to ensure that this decision does not retain any ability to dilute this Court's rulings regarding the FCLAA's preemption of state law claims challenging post-1969 cigarette health warnings, and to weaken, if not obliterate, the uniform system of federal

regulation of cigarette health warnings set forth in the FCLAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 18, 2001

Supreme Court of Florida.

Grady CARTER, et al., Petitioners,
v.
BROWN & WILLIAMSON
TOBACCO CORPORATION,
as successor by merger to
The American Tobacco Company,
Respondents.
No. SC94797.
Nov. 22, 2000.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict First District – Case No. 1D96-4831 (Duval County).

Norwood S. Wilner, Gregory H. Maxwell, and Stephanie J. Hartley of Spohrer, Wilner, Maxwell & Matthews, Jacksonville, Florida; Ada A. Hammond of Johnston, Hammond & Burnett, Jacksonville, Florida; and Raymond Ehrlich of Holland & Knight, L.L.P., Jacksonville, Florida, for Petitioners

J.W. Prichard, Jr. and Robert B. Parrish of Moseley, Warren, Prichard & Parrish, Jacksonville, Florida; Thomas E. Bezanson and Thomas E. Riley of Chadbourne & Parke, LLP, New York, New York; and Barry Richard of Greenberg Traurig, P.A., Tallahassee, Florida, for Respondent

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HARDING, J.

We have for review the decision of *Brown & Williamson Tobacco Corp. v. Carter*, 723 So.2d 833 (Fla. 1st DCA 1998), which expressly and directly conflicts with *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985). We have jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution.

Brown & Williamson and *Copeland* are in conflict regarding when the statute of limitations begins to run in a product liability cause of action involving a latent or "creeping" disease. In such cases, we conclude that the cause of action accrues when the accumulated effects of the deleterious substance manifest themselves to the claimant in a way which supplies some evidence of a causal relationship to the manufactured product. *See Copeland v. Armstrong Cork Co.*, 447 So. 2d 922, 926 (Fla. 3d DCA 1984). By applying this standard to the present case, we find that the Carters' claims were not barred by the statute of limitations and, accordingly, we quash the district court's decision below. We will also briefly address two other issues raised by the district court in its decision; first, whether the Carters' claims were preempted by the Federal Cigarette Labeling Act of 1969 and, second, whether there was an unpleaded cause of action.

I. Facts

A. Case Below

Grady Carter smoked cigarettes for forty-four years, from 1947 until January 1991. Initially, Carter smoked unfiltered Lucky Strike cigarettes (a product of the American Tobacco Company or ATC, Brown & Williamson's predecessor), and in 1972, he changed to another company's product. According to Carter's testimony, he became concerned about his health on January 29, 1991, when he coughed and spit up blood. Carter, concerned that "something was bad wrong with me," consulted a family medical dictionary, which gave two possible explanations for spitting up blood: lung cancer and tuberculosis. Carter immediately called and made an appointment with Dr. Gary Decker for February 4, 1991. On January 29, 1991, Carter quit smoking.

On February 4, 1991, Dr. Decker took chest x-rays and told Carter that he had observed a spot or abnormality on his lung. According to Dr. Decker, this spot could be indicative of several things, including cancer or tuberculosis. Since Dr. Decker was not a lung specialist, he referred Carter to Dr. Bruce Yergin, a pulmonary specialist. Dr. Decker further expressed that Carter probably needed to see Dr. Yergin immediately. Carter saw Dr. Yergin the very next day.

When Carter first visited Dr. Yergin on February 5, 1991, Dr. Yergin examined the chest x-rays and observed a large left upper lobe mass lesion, which he indicated in his report was "highly suggestive of a neoplasm ['most suspicious' for a lung tumor]." Dr. Yergin also noted his impressions of this first visit in Carter's file, which read:

"left upper lobe nodule, COPD (chronic obstructive pulmonary disease), chronic bronchitis, cigarette abuse – 65 pack years." Based on his initial examination of Carter's x-rays, Dr. Yergin testified that he did not tell Carter that he had lung cancer because "many different things can mimic other things on the chest x-ray" and it would have been "absolutely" incorrect to tell Carter that he had lung cancer during the initial visit. Dr. Yergin also testified that on February 5, 1991, he did not know what the nodule was; the nodule could have been tuberculosis or slowly resolving pneumonia and additional tests were necessary in order to make an accurate diagnosis.

On February 12, 1991, Dr. Yergin performed numerous tests, including a bronchoscopy, during which a tissue sample was taken from the lung. The bronchoscopy pathology report showed that Carter had lung cancer and Dr. Yergin told Carter that he had lung cancer on February 14, 1991. Ultimately, Carter had surgery to remove the cancer.

Carter and his wife filed suit against the American Tobacco Company on February 10, 1995, asserting claims for negligence and strict liability. The Carters later amended the style of their case to reflect the merger of ATC and Brown & Williamson. The allegations in the complaint were predicated solely on Carter's smoking Lucky Strikes from 1947 until 1972. Prior to trial, the trial court ruled that whether or not the action was barred by the statute of limitations was an issue for the jury to decide. The jury subsequently determined that the action was not barred by the statute of limitations and awarded a verdict in favor of the Carters on both claims.

Brown & Williamson appealed to the First District Court of Appeal, which reversed the jury's verdict and remanded the case with the instruction that it be dismissed due to the claim being barred by the statute of limitations. The district court concluded that the evidence demonstrated beyond dispute that Carter "knew or should have known, before February 10, 1991, that his lungs were injured, and he was on notice that the injury was probably caused by smoking." *Brown & Williamson*, 723 So. 2d at 836.

The district court also held that if it were not for its decision regarding the statute of limitations, the court would have reversed and remanded the case for a new trial because the Carters were allowed to introduce testimony and evidence at trial which alluded to information that was preempted by the 1969 Federal Cigarette Labeling and Advertising Act. Moreover, the district court found that the trial court erred in permitting the Carters to pursue an unpleaded claim against Brown & Williamson. However, the district court did not reach a conclusion as to whether this error would be grounds for reversal.

B. Conflict Case

In *Celotex Corp. v. Copeland*, the plaintiff filed a product liability cause of action against sixteen different manufacturers and distributors of asbestos products, alleging that his injury was due to exposure to asbestos products over a thirty-three-year period (commencing in 1942) when he worked as a boilermaker. The plaintiff claimed that the long-term exposure to asbestos products caused

his health to deteriorate slowly over a number of years until he developed asbestosis. In 1958 or 1959, the plaintiff first became aware of the possible health hazards from the exposure to asbestos dust, "when another crew at his work site walked off the job because of alleged health hazards from the excessive dust." *Copeland v. Armstrong Cork Co.*, 447 So. 2d at 925. However, the plaintiff did not suffer any physical problems until the late 1960s, when he started to feel "physical discomfort," specifically, difficulty in breathing and watery eyes when he was working around asbestos dust. In 1972, after the plaintiff experienced the more serious symptoms of shortness of breath and coughing up blood, the plaintiff's conditions were diagnosed as pneumonia and emphysema by two different doctors. It was not until 1978 that the plaintiff was "conclusively" diagnosed as having asbestosis.

On April 17, 1979, the plaintiff filed a lawsuit, and in his complaint the plaintiff alleged that

> during his occupational life [he] was exposed to and injured by asbestos products manufactured, sold and distributed by the various defendants herein, that the defendants failed to warn the plaintiff that exposure to asbestos products creates a grave health risk, that defendants' failure to so warn was a proximate cause of [the] plaintiff's injuries and that the defendants are therefore liable under theories of strict liability in tort, negligence and breach of warranty.

Id. In response, the defendants argued that the action was barred by the statute of limitations. Specifically, the defendants alleged that the plaintiff knew or should have

known that the accumulated effects of the asbestos dust were manifesting themselves in such a way as to give some evidence of a causal relationship to the asbestos dust in 1972, when the plaintiff experienced the serious symptoms of shortness of breath and coughing up blood. The trial court agreed and entered a final summary judgment on the ground that the action was time-barred. On appeal, the Third District Court of Appeal reversed. The district court reasoned that in a products liability action involving a "creeping disease," the action accrues " 'only when the accumulated effects of the deleterious substance manifest themselves [to the claimant],' in a way which supplies some evidence of causal relationship to the manufactured product." *Id.* at 926 (citation omitted). The district court added that "these matters are generally treated as fact questions for a jury to resolve, and therefore inappropriate for resolution on a summary judgment or directed verdict." *Id.* The district court concluded:

> Decisive here is the plaintiff's consultation with two doctors immediately after serious symptoms appeared wherein the plaintiff's condition was diagnosed as emphysema and pneumonia unrelated to the job. This disclosure, we think, could lead a reasonable person to conclude, as the plaintiff did, that his condition was not related to the asbestos dust at all. Indeed, the inference seems irresistible as it was based on expert medical advice, rather than lay opinion. Still, it is true that one of those doctors did advise the plaintiff to change jobs so as to avoid the subject asbestos dust, which, it is urged, shows evidence that the plaintiff's serious symptoms were related to the asbestos dust. Perhaps, but, again, this is a question of fact for

> a jury to resolve, as conflicting reasonable inferences can surely be drawn from such a statement.

Id. at 928. Upon review, this Court approved the reasoning of the district court on this issue. *See Celotex Corp. v. Copeland*, 471 So. 2d at 539.

II. Analysis

A. Statute of Limitations

Section 95.11(3)(e), Florida Statutes (1981), states that "[a]n action for injury to a person founded on the design, manufacture, distribution, or sale of personal property . . . shall be commenced . . . [w]ithin four years." *See also Copeland v. Armstrong Cork Co.*, 447 So. 2d at 926. The "Florida statute of limitations law further provides that '[a]ctions for products liability,' as described above, 'must be begun within the period described in this chapter [four years], with the period running from the time the facts giving rise to the cause of action [a] were [actually] discovered [by the claimant] or [b] should have been discovered [by the claimant] with the exercise of due diligence,' § 95.031(2), Fla. Stat. (1981), whichever is earlier." *Id.* (alterations in original). Thus, the applicable limitations period in the present case is four years.

Lung cancer caused by smoking is a latent or "creeping disease." *See Copeland v. Armstrong Cork Co.*, 447 So. 2d at 926 (stating that a latent or "creeping" disease is a disease acquired over a period of years as a result of long-term exposure to injurious substances); *see also Brown & Williamson Tobacco Corp. v. Young*, 690 So. 2d

1377, 1379 (Fla. 1st DCA 1997) (a latent disease is "difficult to pinpoint when and where it began"). In products liability actions involving latent or creeping diseases, we agree with the test forwarded by the Third District Court of Appeal in *Copeland v. Armstrong Cork Co.*: "[T]he action accrues . . . 'only when the accumulated effects of the deleterious substance manifest themselves [to the claimant],' in a way which supplies some evidence of causal relationship to the manufactured product." 447 So. 2d at 926 (citation omitted). *See also Barnes v. Clark Sand Co.*, 721 So. 2d 329, 332 (Fla. 1st DCA 1998) (" '[M]anifestation' of a latent injury in a products liability claim occurs when the plaintiff is on notice of a causal connection between exposure to the allegedly defective product and the resultant injury."), *approved sub nom. Pulmosan Safety Equipment Corp. v. Barnes*, 752 So. 2d 556 (Fla. 2000).[1]

As pointed out by the district court in *Copeland v. Armstrong Cork Co.*, "there is no magic moment when [the point when the facts giving rise to the cause of action are known or should have been known by the plaintiff]

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[1] Other jurisdictions have reached a similar conclusion. For example, in *Naegele v. R.J. Reynolds Tobacco Co.*, 96 Cal.Rptr.2d 666 (Cal. Ct. App. 2000), the California court stated that "determining the accrual date of a cause of action for a latent, progressively developing disease allegedly caused by exposure to a toxic substance is far more difficult, because '[n]o temporally discrete event exists that encompasses the defendant's breach and the plaintiff's injury.' " *Id.* at 672-73 (quoting *Buttram v. Owens-Corning Fiberglas Corp.*, 16 Cal.4th 520, 66 Cal.Rptr.2d 438, 941 P.2d 71-76 (Cal. 1997)). "For statute of limitations purposes, a cause of action for latent injury ordinarily accrues when 'the plaintiff discovers or reasonably should have discovered that he has suffered a compensable injury.' " *Id.* at 673.

arrives as we often deal here with inherently debatable questions about which reasonable people may differ." 447 So. 2d at 926. Therefore, we also agree with the district court in *Copeland v. Armstrong Cork Co.* that the question of when the statute of limitations begins to run in this type of case is "generally treated as [a] fact question[ ] for a jury to resolve, and therefore inappropriate for resolution on a summary judgment or directed verdict." *Id.* In *Celotex Corp. v. Copeland*, 471 So. 2d 533, 539 (Fla. 1985), this Court approved the district court's holding in *Copeland v. Armstrong Cork Co.*: "We agree with the district court that, under these circumstances, when the disease manifested itself was a question of fact not subject to resolution by summary judgment."

In the present case, the First District Court of Appeal attempted to distinguish *Copeland v. Armstrong Cork Co.*:

> In *Copeland v. Armstrong Cork*, the district court noted:
>
> it is urged, the plaintiff knew or should have known at this point that the accumulated effects of the deleterious asbestos dust were manifesting themselves in such a way as to give some evidence of causal relationship to the asbestos dust; this is particularly true when the plaintiff had numerous other warnings prior thereto that the subject asbestos dust was most unhealthy. We certainly agree that a jury could reasonably so conclude, but we cannot agree that a jury could not reasonably fail to do so. *Decisive here is the plaintiff's consultation with two doctors immediately after serious symptoms appeared wherein the plaintiff's condition was diagnosed as emphysema and pneumonia unrelated to the job. This disclosure,*

> *we think, could lead a reasonable person to conclude, as the plaintiff did, that his condition was not related to the asbestos dust at all.* Indeed, the inference seems irresistible as it was based on expert medical advice, rather than lay opinion. Still, it is true that one of those doctors did advise the plaintiff to change jobs so as to avoid the subject asbestos dust, which, it is urged, shows evidence that the plaintiff's serious symptoms were related to the asbestos dust. Perhaps, but, again, this is a question of fact for a jury to resolve, as conflicting reasonable inferences can surely be drawn from such a statement.
>
> 447 So. 2d at 927-28 (emphasis supplied). The underlined portion of the above discussion distinguishes this case from *Copeland*. While appellees assert the record shows other possible causes of his spitting up blood were pneumonia and tuberculosis, at no time was Grady Carter's condition diagnosed as unrelated to smoking. Grady stopped smoking on January 29, 1991, after coughing up blood, and on February 4, 1991, was told of an abnormality on his lung and further told he needed to see Dr. Yergin immediately. We conclude that the evidence shows beyond dispute that Grady Carter knew or should have known, before February 10, 1991, that his lungs were injured, and he was on notice that the injury was probably caused by smoking. Therefore, by the time he filed suit on February 10, 1995, the four year statute of limitations had run.

723 So. 2d at 835-36. We, however, are not persuaded by this distinction. In fact, the very language that the First District quoted from *Copeland v. Armstrong Cork Co.* is persuasive as to why such issues should be resolved by

a jury. In the present case, as in *Copeland v. Armstrong Cork Co.*, we acknowledge that a jury could reasonably conclude that Carter knew or should have known, on either January 29, 1991 (when Carter coughed and spit up blood) or February 4, 1991 (when Dr. Decker told Carter that he observed a spot on his lung and that this spot could be related to several things including cancer or tuberculosis), that the effects of smoking cigarettes manifested themselves to Carter in a way which supplied some evidence of a causal relationship to the cigarettes. However, we cannot agree that a jury could not reasonably fail to do so. Given that Dr. Decker gave Carter at least two possible explanations for the spot, one of which was tuberculosis based on Carter's recent contact with someone who had that disease, a reasonable person could conclude that the spot was not related to smoking or cancer. Because conflicting reasonable inferences can be drawn from the record, this issue was a question of fact for the jury to resolve.

In support of its argument, Brown & Williamson cites to this Court's opinion in *University of Miami v. Bogorff*, 583 So. 2d 1000 (Fla. 1991), for the proposition that knowledge of a legal certainty is not required to start the limitations clock, but rather a plaintiff need only have notice, through the exercise of reasonable diligence, of the possible invasion of his or her legal rights. The district court below also relied on *Bogorff* in support of its conclusion that "[n]either absolute knowledge nor medical confirmation is required for a cause of action to accrue." 723 So. 2d at 836. We reject this argument for two reasons.

First, we point out that the present case involves a products liability claim whereas *Bogorff* involved a medical malpractice claim, and therefore the two cases are distinguishable. Additionally, it is important to note that the holding in *Bogorff* was modified by our decision in *Tanner v. Hartog*, 618 So. 2d 177 (Fla. 1993). *Bogorff* applied the so-called *Nardone* rule: the principle that the limitations period begins to run when the plaintiff knew or should have known that *either* the injury *or* the negligence had occurred. *See Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976). In *Tanner*, we recognized that a strict application of the *Nardone* rule can sometimes lead to harsh results, especially in cases where "there is nothing about an injury that would communicate to a reasonable lay person that the injury is more likely the result of some failure of medical care than a natural occurrence that can arise in the absence of medical negligence." *Norsworthy v. Holmes Regional Medical Center, Inc.*, 598 So. 2d 105, 107 (Fla. 5th DCA 1992), *approved sub nom. Kronman v. Norsworthy*, 618 So. 2d 186 (Fla. 1993), *cited in Tanner*, 618 So. 2d at 180. Therefore, in *Tanner*, we modified the *Nardone* rule and concluded that "the knowledge of the injury as referred to in the rule as triggering the statute of limitations means not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice." 618 So. 2d at 181 (footnote omitted).

Second, we stress that in all of these cases, "[i]t is a well-settled principle of Florida jurisprudence that summary judgment should not be granted unless the facts are so clear and undisputed that only questions of law remain." *Dade County School Board v. Radio Station WQBA*,

731 So. 2d 638, 643 (Fla. 1999). On the basis of the record in the present case, there existed a genuine issue of material fact regarding when Carter knew or should have known of the facts giving rise to the cause of action. "[I]t is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the jury." *Helman v. Seaboard Coast Line RR. Co.*, 349 So. 2d 1187, 1189 (Fla. 1977). In concluding that "the facts of this case unquestionably show that the accumulated effects of smoking manifested themselves to Grady Carter more than four years before he filed this lawsuit," *Brown & Williamson*, 723 So. 2d at 836, the district court overstepped its appellate role. Thus, we quash the district court's decision on this issue.

B. Preempted Claims

If it were not for its decision regarding the statute of limitations, the district court's holding would have been to reverse and remand the case for a new trial because the Carters were allowed to introduce testimony and evidence at trial which alluded to evidence that was preempted by the 1969 Federal Cigarette Labeling and Advertising Act. *See Brown & Williamson*, 723 So. 2d at 836. Again, we agree with the trial court and quash the district court's decision on the preemption issue.

In 1965, Congress passed the Federal Cigarette Labeling and Advertising Act, which required all cigarette packages to contain the warning: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Pub.L. 89-92, § 4, 79 Stat. 282. The purpose of the Labeling Act was to adequately inform the public about the dangers of

cigarette smoking and to protect the national economy from the imposition of diverse and confusing warning requirements regarding cigarettes. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 514, 112 S. Ct. 2608, 120 L.Ed.2d 407 (1992). Four years later, Congress enacted the Public Health Cigarette Smoking Act of 1969, which amended the 1965 Act to require the following warning: "The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health." Pub.L. 91-222, § 4, 84 Stat. 87. The 1969 Act included the following provision:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub.L. 91-222, § 5 (codified at 15 U.S.C. § 1334(b) (1994)).

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524, 112 S. Ct. 2608, 120 L.Ed.2d 407 (1992), the United States Supreme Court was asked to consider whether state common law actions filed against tobacco companies for failure to warn, breach of warranty, fraudulent misrepresentation, and conspiracy were preempted by either the 1965 or 1969 Acts. A plurality of the United States Supreme Court held that the 1965 Act only preempted state and federal rulemaking bodies from mandating particular cautionary statements and did not preempt state-law damages actions. *See id.* at 519-20, 112 S.Ct. 2608. However, the Court came to a different conclusion regarding the 1969 Act. The plurality addressed each of the claims separately. First, the plurality held that the

1969 Act expressly preempts post-1969 failure-to-warn claims that cigarette "advertising or promotions should have included additional, or more clearly stated, warnings." *Id.* at 524, 112 S. Ct. 2608. The plurality added that the "[1969] Act does not, however, pre-empt petitioner's claims that rely solely on respondent's testing or research practices or other actions unrelated to advertising or promotion." *Id.* at 524-25, 112 S. Ct. 2608. Next, the plurality concluded that express warranty claims were not preempted by the 1969 Act because liability for express warranty is not imposed under state law but rather by the warrantor's express actions. *See id.* at 525-27, 112 S. Ct. 2608. The plurality also concluded that the 1969 Act does not preempt fraudulent misrepresentation claims because fraudulent misrepresentation claims are based on a state law duty not to deceive rather than a state law duty "based on smoking and health." *Id.* at 528-29, 112 S. Ct. 2608. Finally, the plurality concluded that the 1969 Act does not preempt conspiracy to defraud claims because such claims are based on a duty not to conspire to commit fraud rather than a duty "based on smoking and health." *Id.* at 530, 112 S. Ct. 2608.

The district court below stated that the trial court made two separate errors concerning the preemption issue. First, the district court held that the trial court erred in denying Brown & Williamson's pretrial motion for partial summary judgment. Second, the district court found that the trial court erred in permitting Dr. Allan Feingold, an expert witness for the plaintiff, to testify regarding a proposed package insert. We disagree with the district court on both of these points.

Prior to trial, Brown & Williamson sought partial summary judgment as to any claim that post-1969 cigarette warning labels were inadequate. In response, the Carters argued that the 1969 Act only preempted claims regarding ATC's post-1969 *advertising or promotions*, but that according to the language of *Cipollone* itself, the 1969 Act does not preempt their claims that rely solely on ATC's "testing or research practices or other actions unrelated to advertising or promotion." *Cipollone*, 505 U.S. at 525, 112 S. Ct. 2608. The Carters also attached a number of so-called advocacy statements of the cigarette industry to its motion, as well as the affidavit of Professor Richard Polley. Polley stated in the affidavit that "in numerous instances, major cigarette manufacturers conducted public relations campaigns, including but not limited to purchasing newspaper space for making public statements [and] issuing press releases." Polley stated that such mass communications are not considered advertising or promotion, as the statements did not contain the cautionary label which were federally required on all advertisements or promotions. In its order denying the motion for partial summary judgment, the trial court cited to Polley's affidavit and concluded that "a genuine issue of material fact" exists regarding the general usage of the terms " 'advertising or promotions.' " Brown & Williamson argues that this decision paved the way for the Carters to introduce a proposed package insert.

In reversing the trial court on this issue, the district court stated:

> We agree that [the trial court's ruling on the motion for partial summary judgment] was in error. The courts have made it clear that, in the

> context of the labeling act, "advertising or promotion" encompasses all forms of communication directed to a mass market. *See, e.g. Griesenbeck v. American Tobacco Co.*, 897 F. Supp. 815 (D.N.J.1995).

We, however, are not persuaded that the *Griesenbeck* court's broad interpretation of the terms "advertising or promotion" is necessarily correct. Certainly, the plain language of the *Cipollone* opinion itself demonstrates that the Supreme Court envisioned that there were other forms of communication unrelated to advertising or promotion. *See, e.g., Philip Morris Inc. v. Harshbarger*, 122 F.3d 58 (1st Cir. 1997) (holding that Massachusetts statute requiring manufacturers of tobacco products to disclose additives and nicotine-yield ratings for their products to a state agency did not violate the 1969 Act, as such communication did not amount to advertising or promotion). Nevertheless, as stated above, summary judgment should not be granted unless the facts are so clear and undisputed that only questions of law remain. Based on Polley's affidavit, we cannot conclude that the trial court erred in denying Brown & Williamson's motion for partial summary judgment. More importantly, any such error on this issue would be harmless, as our review of the record reveals that the Carters' claims were clearly limited to injuries which allegedly resulted from the defendant's failure to provide adequate warnings *prior* to 1969, as explained below.

The district court held that the trial court also erred in permitting plaintiffs' expert Dr. Feingold to introduce a proposed package insert:

More significantly, we agree that Dr. Feingold's proposed package insert implicated post 1969 warnings and that the impact of this proposed insert was pervasive and not remedied by the jury instruction that the 1969 labeling requirements could not be challenged. During the trial of this case, Dr. Feingold, the plaintiff's expert, exhibited to the jury and testified concerning his proposal for an adequate warning about the dangers of cigarette smoking, in the form of a detailed illustrated proposed package insert. In our view, this extensive proposed package insert undoubtedly would run afoul of the federal preemption of state causes of action for inadequate warnings. The presentation of the insert, and testimony about it, strongly implied to the jury that appellant's post 1969 labeling was inadequate.

Appellees assert that the federal labeling law only preempts some state law causes of action, and only preempts failure to warn claims after 1969. They contend Dr. Feingold's package insert was relevant to support their strict liability claim by demonstrating that the product was unreasonably dangerous, and also to rebut Brown & Williamson's defense that no warning would have deterred Grady from smoking. Further, they assert that the primary objection is to the evidence itself rather than to a federal preemption issue.

Appellant's argument is persuasive. The testimony and exhibit were extensive, and the substance of the proposed package insert was not limited to a particular time period. In fact, it appears that some of the information contained in the insert was not available until after 1969.

> Significantly, as noted later in this opinion, Carter testified that additional information, such as that contained in the package insert, might have affected his smoking. We believe the presentation strongly implied that additional warnings should have been given, without limitation as to time period.

Brown & Williamson, 723 So. 2d at 837. We disagree. During the trial, the Carters' counsel asked Dr. Feingold about a proposed package insert which Dr. Feingold stated should have been prepared by the cigarette industry, and in particular, ATC. The defense objected, arguing that the package insert was preempted by the 1969 Act. The Carters' counsel argued at sidebar that the insert was only being offered to support the Carters' pre-1969 claims. The trial court overruled the defense's objection and permitted the introduction of the insert, but assured the defense that the jury would be specifically instructed regarding which dates to be considered by them with respect to warnings. Subsequently, at the end of the trial, the trial court gave the jury the following instruction:

> The federal law does not limit the liability of [a] defendant against the claim of a failure to warn before July 1, 1969. However, you are not to base any findings of liability on a determination that after July 1, 1969, the defendant should have included additional or more clearly stated warnings in the advertising or promotion of its cigarettes or that the defendant, through its advertising or promotional practices, neutralized, minimized, or undermined the effect of the federally mandated warnings during that time.

Absent a finding to the contrary, juries are presumed to follow the instructions given them. *See Sutton v. State*, 718 So. 2d 215, 216 (Fla. 1st DCA 1998). Even assuming that some of the information in the proposed insert was not available until after 1969, we do not find that this prejudiced Brown & Williamson, as this information was not the focus of Dr. Feingold's testimony. Hence, we disapprove the district court's analysis and conclusion on this issue.

C. Unpleaded Claim

Brown & Williamson asserts that the district court correctly ruled that the Carters were improperly allowed to submit proof of a cause of action they never alleged. The district court found that the Carters' use of the so-called Brown & Williamson documents during the trial, as well as expert testimony concerning the documents, in effect amounted to an unpleaded claim against Brown & Williamson in its own right rather than against Brown & Williamson as successor to ATC. Again, we disagree.

The evidence in question consisted of documentary and testimonial evidence showing research conducted by Brown & Williamson, the British American Tobacco Company, and the Battelle Institute in the 1950s through the 1970s. The story behind how this evidence came to light is most peculiar, but fortunately the tale is one that we need not tell nor address. *See* Stanton A. Glantz et al., *The Cigarette Papers* (1996); Lisa Bero, et al., *Lawyer Control of the Tobacco Industry's External Research Program: The Brown and Williamson Documents*, 274 JAMA 241 (1995). The evidence allegedly revealed that Brown & Williamson and

its affiliates had conducted research on the dangers of smoking and learned as early as 1963 that nicotine was addictive.

During the trial, the Carters presented the testimony of ATC officials, including a former CEO and a former research director, who testified that ATC never conducted any tests to determine whether smoking was harmful or whether nicotine was addictive. The Carters argue that the Brown & Williamson documents were relevant to establish the state of the art pertaining to possible risks associated with smoking, *i.e.*, that had ATC conducted testing, it would have learned of the harmful nature of smoking. However, the district court below concluded that "the focus placed on the objectionable documents was less on what Brown & Williamson, and therefore other manufacturers, knew, and more on Brown & Williamson's alleged failure to disclose all that it knew, an allegation not attributable to ATC by virtue of its position in the industry." 723 So. 2d at 838.

In *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 461 (5th Cir. 1985), the Fifth Circuit Court of Appeals stated the following:

> Defendants contend that Smith's testimony is irrelevant because it relates only to Johns-Manville. Their contention reflects a misunderstanding of a critical issue in any product liability action: the state of the art pertaining to any possible risks associated with the product. *Dartez* was required to establish that the dangers of asbestos were reasonably foreseeable or scientifically discoverable at the time of his exposure before these defendants could be found liable. *Borel v. Fibreboard Paper Products Corp.*,

493 F.2d 1076, 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974).

Borel holds all manufacturers to the knowledge and skill of an expert. They are obliged to keep abreast of any scientific discoveries and are presumed to know the results of all such advances. Moreover, they each bear the duty to fully test their products to uncover all scientifically discoverable dangers before the products are sold. *Id.* at 1089-90. The actual knowledge of an individual manufacturer is not the issue. If the dangers of asbestos were known to Johns-Manville at the time of Dartez's exposure, then the same risks were scientifically discoverable by other asbestos corporations. Therefore, the testimony of the medical director of the industry's largest member is relevant to plaintiff's attempt to meet the evidentiary burden defined by *Borel*.

Even relevant evidence may be excluded if its probative value is outweighed by the danger that it will unfairly prejudice or confuse the jury. Fed.R.Evid. 403. However, because Rule 403 permits the exclusion of probative evidence, it is an extraordinary remedy that must be used sparingly. *United States v. Thevis*, 665 F.2d 616, 633 (5th Cir.), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982).

Smith's testimony has a significant probative value in the jury's assessment of the state of the art. Dartez used only those portions of the deposition that were relevant to this issue. Defendants assert that this testimony was prejudicial because it allowed the jury to find these defendants liable for the knowledge and conduct of Johns-Manville. But this argument misses the

> point of *Borel* – the knowledge of one manufacturer can be a proper basis for concluding that another manufacturer should have warned of a specific danger. Rule 403 is designed to exclude evidence that has an "undue tendency to suggest decision on an improper basis. . . . " Fed.R.Evid. 403 advisory committee note. Smith's testimony, while contrary to defendants' interest, cannot be construed as unfairly prejudicial under this standard.

Florida courts have also recognized that "[a] manufacturer has the duty to possess expert knowledge in the field of its product." *Advance Chemical Co. v. Harter*, 478 So. 2d 444, 448 (Fla. 1st DCA 1985).

If ATC had not merged with Brown & Williamson, there would be no question that the evidence would have been admissible, as the evidence was relevant to establish that the risks of cigarette smoking that were discovered by one cigarette manufacturer were scientifically discoverable by other cigarette manufacturers. The question is therefore whether this evidence was more prejudicial than probative due to the merger. Certainly the corporate acquisition of ATC by Brown & Williamson is fortuitous; however, we do not find that this fact alone rendered the evidence inadmissible. First, after concluding that the evidence would have been admissible absent the merger, we do not believe that the Carters should be disadvantaged merely because of the corporate acquisition. Second, the trial court instructed the jury that

> Plaintiffs Grady and Mildred Carter do not raise claims based on the conduct of Brown & Williamson Tobacco Corporation. Their claims are based solely on the conduct of the American

> Tobacco Company, prior to the time that it merged with the Brown and Williamson Tobacco Corporation in 1995.

Finally, "[w]here a trial court has weighed probative value against prejudicial impact . . . an appellate court will not overturn that decision absent a clear abuse of discretion." *Sims v. Brown*, 574 So. 2d 131, 133 (Fla. 1991) (quoting *Trees v. K-Mart Corp.*, 467 So. 2d 401, 403 (Fla. 4th DCA 1985)). The district court below did not find that the trial court abused its discretion. In *Sims*, this Court added that the "weighing of relevance versus prejudice or confusion is best performed by the trial judge who is present and best able to compare the two." 574 So. 2d at 133. Based on the record in this case, we conclude that the trial court did not err in permitting the evidence.

III. Conclusion

We hold that the district court erred in its decision that the statute of limitations had run on the Carters' claims. Additionally, we find that evidence presented at trial was not preempted by the Federal Cigarette Labeling and Advertising Act. Finally, we find no merit to Brown & Williamson's argument that the Carters' were allowed to proceed on an unpleaded claim. Accordingly, we quash the district court's decision in this case.

It is so ordered.

WELLS, C.J., and SHAW, LEWIS and QUINCE, JJ., concur.

ANSTEAD and PARIENTE, JJ., recused.

BROWN & WILLIAMSON TOBACCO CORPORATION, as successor by merger to The American Tobacco Company, Appellant,

v.

GRADY CARTER and Mildred Carter, Appellees.

No. 96-4831.

District Court of Appeal of Florida,
First District.

June 22, 1998.

As Amended on Partial Grant of Clarification and Denial of Rehearing Dec. 31, 1998.

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PER CURIAM.

In this appeal from a final judgment following a jury trial, appellant, Brown & Williamson Tobacco Corp. ("Brown & Williamson"), as successor by merger to The American Tobacco Co. ("ATC"), raises the following issues:

> Whether the action should have been dismissed as barred by the statute of limitations, section

95.11(3), Florida Statutes, because the case was filed more than four years after Carter had notice that he had lung disease attributed to smoking?

Whether the court erred in allowing plaintiffs to proceed at trial upon a claim not pleaded against either ATC or its "Lucky Strike" product, to the effect that Brown & Williamson, by secreting documents from the Surgeon General in 1963, obstructed federal lawmaking that would have mandated more strident warnings to Grady Carter?

Whether the court erred in permitting the jury to decide the preemptive scope of the federal Labeling Act, 1969-1996, and also in allowing plaintiffs to impeach the federal warnings?

Whether the trial court reversibly erred in permitting speculative testimony by expert witness Dr. Feingold as well as by Grady Carter on the efficacy of his proposed warnings?

Whether the trial court reversibly erred in receiving as an admission by Brown & Williamson the confidential memorandum of advice and opinion work product written by general counsel Yeaman in 1963?

Based on our review of the record and consideration of the arguments presented, we conclude that the action was barred by the statute of limitations because the initial complaint was filed more than four years after Grady Carter knew or should have known, with the exercise of due diligence, that he had a smoking related disease. Therefore, we reverse and remand for dismissal. We will also address briefly several of the other issues raised.

Grady Carter, age 66 at the time of trial, began smoking in 1947 and continued to smoke until January, 1991. This suit was filed on February 10, 1995. Carter smoked Lucky Strikes, a product of ATC, Brown & Williamson's predecessor, from 1947 until 1972. He then changed to another company's product. The allegations in his complaint are predicated solely on his smoking Lucky Strikes from 1947 until 1972, on the theory that, by 1972, he was addicted to nicotine.

The Carters filed suit on February 10, 1995. Appellant contends the applicable four year statute of limitations had run by that time, because the Carters had notice no later than February 5, 1991, that Grady had a smoking related disease. According to Grady's testimony, he became concerned about his health when, on January 29, 1991, he coughed and spit up blood. He immediately called and made an appointment with Dr. Decker for February 4, 1991. He was concerned that "something was bad wrong with me," and he went to the medical book to try and find out what the problem might be. He recalled finding two things that would result in spitting up blood: lung cancer and tuberculosis. As of that date, Grady quit smoking.

On February 4, 1991, Dr. Decker took chest x-rays and discussed them with Carter. Dr. Decker told Grady he had observed a spot or abnormality on the lung which could indicate several things, including cancer or tuberculosis. Dr. Decker referred Grady to a pulmonary specialist, Dr. Yergin, and told Carter he probably needed to see Dr. Yergin immediately. Carter initially saw Dr. Yergin the next day, February 5, 1991.

Dr. Yergin performed a number of tests, including a bronchoscopy, on February 12, 1991, in which a tissue sample is taken from the lung. On February 14, 1991, Dr. Yergin told Grady he had lung cancer. Grady ultimately had surgery and has survived to the present. He testified that, prior to February 14, 1991, he did not know for sure what the problem was.

Dr. Yergin testified that when Grady first came in on February 5, 1991, a chest x-ray had already been done. He looked at that x-ray and observed a large left upper lobe mass lesion which he indicated in his report of that visit was highly suggestive of a neoplasm, i.e., lung tumor. He did not tell Carter on that date that he had lung cancer based on the x-ray, because "many different things can mimic other things on the chest x-ray." Several additional tests were necessary to make an accurate diagnosis, including the bronchoscopy, in which a tissue sample is obtained. His notes of February 5, 1991 reflect his impressions: left upper lobe nodule, COPD, chronic bronchitis, cigarette abuse of approximately 65 "pack years." He did not know what the nodule was on that day. The nodule could have been tuberculosis or a slowly resolving pneumonia. He said it would not have been correct to tell Carter on February 5 that he had lung cancer. The bronchoscopy pathology report showed Carter had lung cancer.

Appellant contends the Carters had notice of any actionable injury from smoking on February 5, 1991, when Dr. Yergin made the initial diagnosis of chronic obstructive pulmonary disease ("COPD") and chronic bronchitis due to cigarette abuse. Appellees contend the question when Carter reasonably should have known of

his smoking related injury was for the jury to decide. In particular, citing *Copeland v. Armstrong Cork Co.*, 447 So. 2d 922 (Fla. 3d DCA 1984), *aff'd in part Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985), appellees assert it would not be unreasonable for a jury to find that the date of the confirming diagnosis of a disease caused by a product is the operable date for the statute of limitations to begin running. In *Copeland v. Armstrong Cork*, the district court noted:

> it is urged, the plaintiff knew or should have known at this point that the accumulated effects of the deleterious asbestos dust were manifesting themselves in such a way as to give some evidence of causal relationship to the asbestos dust; this is particularly true when the plaintiff had numerous other warnings prior thereto that the subject asbestos dust was most unhealthy. We certainly agree that a jury could reasonably so conclude, but we cannot agree that a jury could not reasonably fail to do so. *Decisive here is the plaintiff's consultation with two doctors immediately after serious symptoms appeared wherein the plaintiff's condition was diagnosed as emphysema and pneumonia unrelated to the job. This disclosure, we think, could lead a reasonable person to conclude, as the plaintiff did, that his condition was not related to the asbestos dust at all.* Indeed, the inference seems irresistible as it was based on expert medical advice, rather than lay opinion. Still, it is true that one of those doctors did advise the plaintiff to change jobs so as to avoid the subject asbestos dust, which, it is urged, shows evidence that the plaintiff's serious symptoms were related to the asbestos dust. Perhaps, but, again, this is a question of fact for a jury to resolve, as conflicting reasonable inferences can surely be drawn from such a statement.

(emphasis supplied.) 447 So. 2d at 927-28. The underlined portion of the above discussion distinguishes this case from *Copeland*. While appellees assert the record shows other possible causes of his spitting up blood were pneumonia and tuberculosis, at no time was Grady Carter's condition diagnosed as unrelated to smoking. Grady stopped smoking on January 29, 1991, after coughing up blood, and on February 4, 1991, was told of an abnormality on his lung and further told he needed to see Dr. Yergin immediately. We conclude that the evidence shows beyond dispute that Grady Carter knew or should have known, before February 10, 1991, that his lungs were injured, and he was on notice that the injury was probably caused by smoking. Therefore, by the time he filed suit on February 10, 1995, the four year statute of limitations had run. Neither absolute knowledge nor medical confirmation is required for a cause of action to accrue. *See, e.g. University of Miami v. Bogorff*, 583 So. 2d 1000 (Fla. 1991) (knowledge of dramatic change in condition and possible involvement of medical malpractice sufficient for accrual of cause of action).[1]

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[1] Appellee asserts the supreme court receded from *Bogorff* in *Tanner v. Hartog*, 618 So. 2d 177 (Fla. 1993). Both *Bogorff* and *Tanner* were medical malpractice cases, which distinguishes them in part from the present case. The court discussed whether knowledge of the injury or the negligent act or both was required to trigger the running of the statute of limitations. In *Tanner*, the court refined its analysis and held that the medical malpractice statute of limitations would be triggered when there was "not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice."

In *Copeland*, the district court said:

> Where . . . the claimed injury in a products liability action is a so-called 'creeping disease,' like asbestosis, acquired over a period of years as a result of long-term . . . exposure to injurious substances, such as asbestos dust, the courts have held that the action accrues for purposes of the statute of limitations " 'only when the accumulated effects of the deleterious substance manifest themselves [to the claimant],' " *Urie v. Thompson*, 337 U.S. 163, 170, 69 S.Ct. 1018, 1024, 93 L.Ed. 1282 (1949), "in a way which supplies some evidence of causal relationship to the manufactured product. . . . " *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155, 160-61 (8th Cir. 1975). . . . At that point, it is said that the facts giving rise to the cause of action either [a] are actually known by the claimant, or [b] should have been known to the claimant with the exercise of due diligence.

447 So. 2d at 926. Although the court went on to say this is generally a fact question for the jury, we conclude that the facts of this case unquestionably show that the accumulated effects of smoking manifested themselves to Grady Carter more than four years before he filed this lawsuit, and that reversal is required on this issue.[2]

Appellant raises an issue concerning the effect on the trial of this case of references to labeling practices in light

---

[2] We have considered and rejected appellees' argument regarding separate injuries as separate causes of action with different accrual dates, as we have determined the accrual date for all smoking related lung injuries occurred more than four years before the complaint was filed.

of the federal preemption of causes of action based on the adequacy of warning labels on cigarette packaging. Were it not for our decision regarding the statute of limitations, we would reverse and remand for a new trial on this issue.

Although the 1965 federal labeling act, which first required cigarette warning labels, did not preempt state standards, the warnings required by the 1969 federal labeling act did so. In other words, state causes of action based on claims that additional or more clearly stated warnings should have been placed on advertising or promotional materials after 1969 are prohibited by federal law. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

Before trial, Brown & Williamson sought partial summary judgment as to any claim that post 1969 cigarette warning labels were inadequate. Appellees contended that the phrase "advertising or promotional materials" should be narrowly construed. The trial court denied Brown & Williamson's motion for partial summary judgment on that issue, ruling that a genuine issue of material fact existed as to the "general usage of the terms 'advertising or promotion' " as used in the labeling act. We agree that this ruling was in error. The courts have made it clear that, in the context of the labeling act, "advertising or promotion" encompasses all forms of communication directed to a mass market. *See, e.g. Griesenbeck v. American Tobacco Co.*, 897 F. Supp. 815 (D.N.J. 1995).

More significantly, we agree that Dr. Feingold's proposed package insert implicated post 1969 warnings and that the impact of this proposed insert was pervasive and

not remedied by the jury instruction that the 1969 labeling requirements could not be challenged. During the trial of this case, Dr. Feingold, the plaintiff's expert, exhibited to the jury and testified concerning his proposal for an adequate warning about the dangers of cigarette smoking, in the form of a detailed illustrated proposed package insert. In our view, this extensive proposed package insert undoubtedly would run afoul of the federal preemption of state causes of action for inadequate warnings. The presentation of the insert, and testimony about it, strongly implied to the jury that appellant's post 1969 labeling was inadequate.

Appellees assert that the federal labeling law only preempts some state law causes of action, and only preempts failure to warn claims after 1969. They contend Dr. Feingold's package insert was relevant to support their strict liability claim by demonstrating that the product was unreasonably dangerous, and also to rebut Brown & Williamson's defense that no warning would have deterred Grady from smoking. Further, they assert that the primary objection is to the evidence itself rather than to a federal preemption issue.

Appellant's argument is persuasive. The testimony and exhibit were extensive, and the substance of the proposed package insert was not limited to a particular time period. In fact, it appears that some of the information contained in the insert was not available until after 1969. Significantly, as noted later in this opinion, Carter testified that additional information, such as that contained in the package insert, might have affected his smoking. We believe the presentation strongly implied

that additional warnings should have been given, without limitation as to time period.

Appellant also asserts that in the use at trial of numerous documents that were generated by Brown & Williamson during the early 1960s, and Dr. Feingold's testimony concerning the documents, appellees in effect pursued an unpleaded claim against Brown & Williamson in its own right, for secreting research from the United States Surgeon General, when the claims in this case are against Brown & Williamson only as successor to ATC. (The merger of ATC and Brown & Williamson occurred after this lawsuit was filed.) Brown & Williamson contends it was unable to prepare to meet such an unpleaded claim. We agree, particularly because of the manner in which this information was presented to the jury.

Appellees introduced documents, some of hundreds listed pretrial as exhibits, which were not discovered until after this claim was filed, and after the merger of ATC with Brown & Williamson, indicating that certain research performed or sponsored by Brown & Williamson in the early 1960s was not provided to the surgeon general, who at that time was gathering information in preparation for an initial report on the effects of smoking. Although the court subsequently instructed the jury that there was no claim against Brown & Williamson directly, we do not believe the instruction was adequate to dispel the prejudice to Brown & Williamson, particularly when, for example, during opening statement to the jury, appellees' counsel told the jury that Brown & Williamson conducted "secret" research on addiction to nicotine which it never turned over to the surgeon general, and therefore Brown & Williamson did not do its job. Further, appellees

asserted in the courtroom with the jury present that "this research which was not turned over to the U.S. Surgeon General affected the course of public health, affected cautionary labels on packages, and affected Grady Carter."

Appellees contend that the documents were relevant on the theory that industry knowledge is attributable to all manufacturers, citing *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985), and *Advance Chemical Co. v. Harter*, 478 So. 2d 444 (Fla. 1st DCA 1985), *review denied* 488 So. 2d 829 (Fla. 1986), thus, what Brown & Williamson knew in the early 1960s, ATC also should have known. They contend the evidence would have been relevant even if there had been no merger. We believe, however, that the focus placed on the objectionable documents was less on what Brown & Williamson, and therefore other manufacturers, knew, and more on Brown & Williamson's alleged failure to disclose all that it knew, an allegation not attributable to ATC by virtue of its position in the industry.

Appellant contends that a certain memorandum, dated July 17, 1963, was confidential work product and should not have been admitted in evidence. The trial court admitted the document on the theory that it fit within the crime or fraud exception to the privilege. We cannot agree. We perceive absolutely no evidence of criminal or fraudulent intent in the content of the memo; we would not reverse for a new trial based on this issue alone, however.

Finally, appellant raises an issue concerning the use of allegedly speculative testimony by Dr. Feingold and

Grady Carter. While we believe the admission of the testimony may have violated the rule set forth in *Drackett Products Co. v. Blue*, 152 So. 2d 463 (Fla. 1963) ("statement by a witness as to what action he would have taken if something had occurred which did not occur . . . will ordinarily be rejected as inadmissible and as proving nothing."), we also believe that any error was insignificant in the context of this case.

REVERSED.

BARFIELD, C.J., JOANOS, J., and SMITH, LARRY G., Senior Judge, concur.

Supreme Court of Florida

FRIDAY, JANUARY 19, 2001

CASE NO.: SC94797
Lower Tribunal No.: 1D96-4831

GRADY CARTER, ET AL. vs. BROWN & WILLIAMSON TOBACCO CORPORATION, ETC.

Petitioner(s) Respondent(s)

Respondent's Motion for Rehearing is hereby denied.

WELLS, C.J., and SHAW, HARDING, LEWIS and QUINCE, JJ., concur.

A True Copy

Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

bh
Served:

HON JON S. WHEELER, CLERK
STEPHANIE J. HARTLEY
CARTER, GRADY
NORWOOD SHERMAN WILNER
CARTER, MILDRED
GREGORY H. MAXWELL
CHARLES M. JOHNSTON
RAYMOND EHRLICH
ADA A. HAMMOND
THOMAS E. BEZANSON

JACK W. SHAW, JR. (FL DEFENSE
BROWN & WILLIAMSON TOBACCO
ROBERT B. PARRISH
THOMAS E. RILEY
J.W. PRICHARD, JR
BARRY RICHARD
HON. BRIAN J. DAVIS, JUDGE
HON. HENRY W. COOK, CLERK.
RICHARD A. BARNETT
MARY T. YELENICK

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO.: 95-00934 CA

DIVISION: CV-B

Grady Carter and
Mildred Carter
Plaintiffs,

vs.

Brown & Williamson Tobacco Corporation, as successor by merger to the American Tobacco Company, etc., et. al;
Defendants.

FINAL JUDGMENT

Pursuant to the verdict rendered in this action

IT IS ADJUDGED that Plaintiffs, Grady Carter and Mildred Carter, his wife, recover from Defendant, Brown & Williamson Tobacco Corporation, as successor by merger to The American Tobacco Company, the sum of $750,000.00, that shall bear interest at the rate of ten percent (10%) a year for which let execution issue. The Court reserves jurisdiction to enter further orders awarding attorney's fees and costs upon application therefor.

ORDERED in Chambers at Jacksonville, Duval County, Florida this _____ day of August, 1996.

ORDER ENTERED
Aug. 15, 1996
/s/ Brian J. Davis
Brian J. Davis, Circuit Judge

Copies to:

All Counsel of Record

BROWN & WILLIAMSON TOBACCO CORP. (as successor by merger to The American Tobacco Company), Petitioner,

v.

Grady CARTER and Mildred Carter, Respondents.

No. 96-1747.

District Court of Appeal of Florida, First District.

July 16, 1996.

J.W. Prichard, Jr., James F. Moseley and Robert B. Parrish of Moseley, Warren, Prichard & Parrish, Jacksonville, for petitioner.

Norwood S. Wilner, Gregory H. Maxwell and Stephanie J. Franda of Spohrer, Wilner, Maxwell, Maciejewski & Stanford, Jacksonville, for respondents.

PER CURIAM.

Through this timely petition for writ of certiorari, Brown & Williamson Corporation seeks review of a non-final order of the circuit court which denied its motion for summary judgment on certain claims of the plaintiffs. For the reasons set forth below, we deny the petition.

Respondents are plaintiffs in the trial court seeking to recover damages for personal injuries allegedly caused by cigarette smoking. The defendant sought summary judgment on all post-1969 failure to warn claims, asserting they were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340. The trial court denied summary judgment, reasoning that, to the extent plaintiffs' failure to warn claims relied upon the

adequacy or inadequacy of communications unrelated to advertising or promotion, they remained viable. This theory, according to the defendants, was rejected in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

We find relief is not warranted at this juncture because petitioners have not shown an injury which cannot be remedied on appeal from a final order. Denial of a motion for summary judgment or a motion to dismiss will not be reviewed through certiorari for this reason. *See Vanco Const., Inc. v. Nucor Corp.*, 378 So. 2d 116 (Fla. 5th DCA 1980); *Johnson v. Henningson*, 370 So. 2d 60 (Fla. 4th DCA 1979), *cert. denied and appeal dismissed*, 383 So. 2d 1196 (Fla. 1980). Petitioners argue that failure to correct this trial court error now will result in an unnecessary trial in this case and others because they will ultimately have to be retried as a consequence of the trial court's error. This court, however, has found that the time, trouble, and expense of an unnecessary trial is not "irreparable harm" when determining whether the threshold elements of certiorari jurisdiction have been met. *Continental Equities, Inc. v. Jacksonville Transp. Authority*, 558 So. 2d 154 (Fla. 1st DCA 1990). Indeed, one of the decisions of this court upon which petitioner relies as demonstrating error in the trial court's ruling shows that appeal from a final judgment can be and is an adequate remedy. *ISK Biotech Corp. v. Douberly*, 640 So. 2d 85 (Fla. 1st DCA 1994), *rev. denied*, 651 So. 2d 1194 (Fla. 1995).

PETITION FOR WRIT OF CERTIORARI DENIED.

BOOTH, WOLF and VAN NORTWICK, JJ., concur.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA,

CASE NO.: 95-934 CA

DIVISION: CV-B

GRADY CARTER and MILDRED CARTER,

Plaintiffs,

vs.

THE AMERICAN TOBACCO COMPANY, et al.,

Defendants.

ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came on to be heard, after proper notice, on the Defendant's Motion for Partial Summary Judgment. The parties appeared through counsel and the Court considered the *[sic]* their argument and the record in this cause including its' [sic] pleadings, memoranda and affidavits.

Defendant moves for Partial Summary Judgment on the grounds that large portions of plaintiffs' complaint are barred by the doctrine of federal preemption. Specifically, it is argued that the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. § 1331 *et seq.* (F.C.L.A.A.) preempts plaintiffs' claims because they are based on alleged post-July 1, 1969 actions or omissions of

defendants in failing to warn of, or in not disclosing, possible health risks associated with smoking cigarettes.

Pivotal to the Court's consideration of defendant's Motion is *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) which begins its analysis with the assumption that historic state powers are due deference by the federal government absent a "clear and manifest" purpose in Congress to exercise its' [sic] legislative supremacy through Article VI of the Constitution. Such a clear and manifest purpose is expressly stated in 15 U.S.C. § 1334.

In light of the presumption against preemption of state police power, the Court in *Cipollone* looked only to the "domain expressly preempted" in holding that the claims it considered were preempted to the extent they relied upon advertising or promotion, but not to the extent they relied upon other actions unrelated to advertising or promotion.

In applying the *Cipollone* Courts [sic] reasoning to the instant case this Court holds to the extent the plaintiffs' failure to warn claims rely upon the adequacy or inadequacy of post-1969 advertising or promotions regarding cigarettes they are preempted by 15 U.S.C.A. § 1334. To the extent such claims rely upon the adequacy or inadequacy of communications unrelated to advertising or promotion, they remain viable.

Defendants [sic] reliance upon lower Federal Courts [sic] rulings applying the preemption doctrine is misplaced in that each claim precluded relied upon communications contained in advertising or promotions, e.g. point of sale signs, advertising space on taxis, etc. Defendants [sic] reliance on *Griesenbeck v. The American Tobacco Co.*, 897 F.

Supp. 815 (U.S.D.N.J 1995), and that Court's rejection of the plaintiffs' claim that the defendant owed a duty to warn through some variety of mass-notification, citing *Cipollone*, is likewise unpersuasive on this record, in that a genuine issue of material fact exists regarding the general usage of the terms "advertising or promotions". *See, Affidavit of Richard Pollay*, filed March 21, 1996.

Defendant's [sic] rely upon authorities applying the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. § 136-136y ("F.I.F.R.A."). Those cases are distinguishable in that, by its very terms, to which this and other courts are compelled to look in identifying the "domain expressly preempted", the F.I.F.R.A. proscribes any requirements "in addition to or different from those required by the act". Neither *Cipollone* nor the F.C.L.A.A. mandate such restrictions.

With respect to defendants's Motion for Partial Summary Judgment regarding Count I, paragraph 18(f) of plaintiffs' complaint, while Florida does not recognize an independent and separate claim based upon a manufacturer's duty to test, it is clear that such a claim is subsumed by a manufacturer's duty to design a product with reasonable care. *Adams v. G.D. Searle & Co., Inc.*, 576 So. 2d 728 (Fla. 2d DCA 1991).

Finally, with respect to plaintiff Mildred Carter's derivative claims, to the extent this Court's ruling limits plaintiff Grady Carter's claims, plaintiff Mildred Carter's claims are likewise limited.

Accordingly, upon consideration, it is

ORDERED AND ADJUDGED

1. Defendant's Motion for Partial Summary Judgment is granted in part and denied in part, consistent with the findings and holding hereinabove stated.

DONE AND ORDERED in chambers, at Jacksonville, Duval County, Florida, this ___ day of April, 1996.

ORDERED ENTERED
APR. 4, 1996

/s/ Brian J. Davis
BRIAN J. DAVIS
Circuit Judge

Copies to:

Gregory H. Maxwell, Esquire
444 East Duval Street
Jacksonville, Florida 32202

Michael Coulson, Esquire
225 Water Street, Suite 1000
Jacksonville, Florida 32202

J. W. Prichard, Jr., Esquire
501 West Bay Street
Jacksonville, Florida 32202

Filed in Evidence as Plaintiff's Exhibit 7 Date 7/26/96 Case 96-00934-CA

Filed for Identification as PLAINTIFF'S Exhibit G Date 7/26/96 Case 96-00934-CA

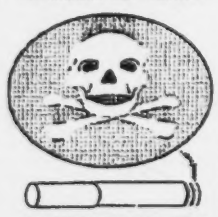
DANGER! HEALTH HAZARD

HAZARDS FROM CIGARETTE SMOKE

Premature Death -- Lung Cancer -- Throat Cancer -- Kidney Cancer -- Bladder Cancer -- Esophageal Cancer -- Other Cancers -- Heart Attack -- Stroke -- Vascular Disease -- Emphysema -- Chronic Bronchitis -- Low Birthweight Infant -- Addiction to Nicotine -- Genetic Damage

This critical information is presented to you so that you can be better informed about the serious health hazards you face if you smoke. Read this information carefully. *Your life may depend on it.*

DANGER!

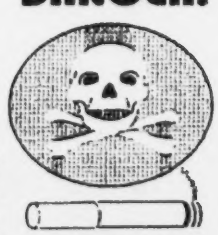


PREMATURE DEATH

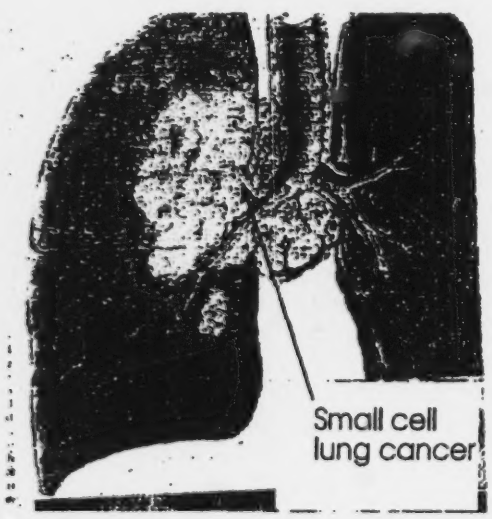
DANGER. PREMATURE DEATH.

If you smoke these cigarettes you are in great danger from number of diseases, including **lung cancer, heart disease, chronic obstructive pulmonary disease, and cancers of the kidney, esophagus, throat, pancreas, bladder, and other organs**. You may be permanently disabled, in great pain, or die prematurely.from these diseases caused by cigarette smoke. Your danger of dying is at least twice as great if you smoke. **Forty to fifty percent of regular smokers die prematurely from diseases caused by cigarette smoking.** To avoid these serious diseases and danger of premature death, stop smoking now.

DANGER!

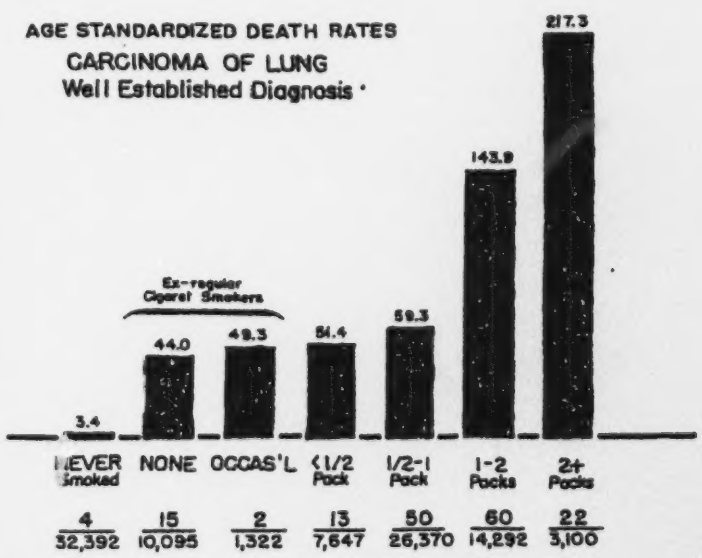


LUNG CANCER



DANGER. LUNG CANCER.

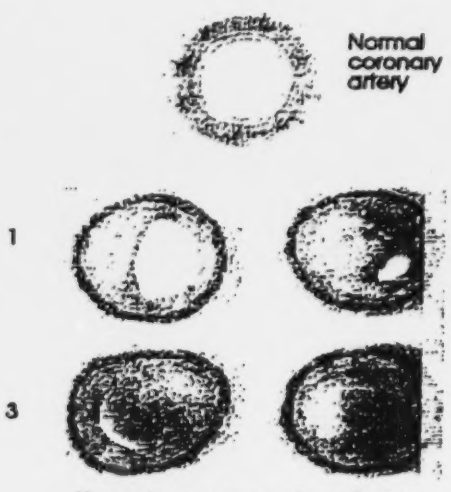
If you smoke cigarettes you are in danger of getting lung cancer. Lung cancer is a group of diseases that display uncontrolled cell growth in the airways or other parts of the lung. Lung cancer kills more Americans than any other cancer. Cigarette smoke increases the danger of lung cancer. The danger depends on how much you smoke, how early you started, and other factors. **The danger from lung cancer can increase by by 25 times, or 2500%.** Very few people who do not smoke ever get lung cancer. Lung cancer is a very serious disease. Initially it has no symptoms. When it is diagnosed it has often spread to other parts of the body, including the brain or liver. This spread of cancer is called *metastatic disease,*



Smoking and Lung cancer danger

and is always fatal. Ninety-five percent of lung cancer patients die within five years of their diagnosis. Cigarette smoking has been proved to cause lung cancer. Lung cancer occurs in cigarette smokers at least 25 times as much as in nonsmokers. Lung tissue in smokers shows precancerous and cancerous changes visible under a microscope. Laboratory animals get cancer when exposed to cigarette tar. **It is the official position of the United States Government that cigarette smoking causes lung cancer.**

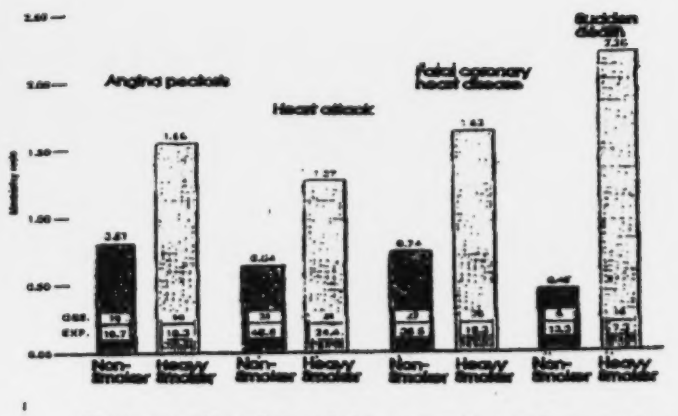
DANGER. CARDIOVASCULAR DISEASE.



Stages in coronary artery disease

Coronary artery disease progresses from normal artery to complete blockage, causing heart attact. Smoking accelerates this.

Cigarette smoking puts you in danger of cardiovascular disease, a group of diseases of the heart and blood vessels. When you have cardiovascular disease, arteries carrying blood to many organs can become blocked, leading to **heart attack, stroke, peripheral vascular disease**, and other serious medical problems. **Heart attack** or *myocardial infarction* is a blockage or thrombosis in an artery that supplies blood to the heart. When this occurs, the heart muscle is starved for oxygen and may die. The heartbeat can become irregular and cause death. If you suffer a heart attack it may be impossible to save your life. **Stroke** or CVA is an intrerruption of blood supply to the brain. This may be fatal or may cause permanent paralysis, inability to speak, or other impairment. **Peripheral vascular disease** is a disesae of the arteries of your legs and arms. These arteries can become blocked and cause pain and disability. You may be unable to walk normally, or even require amputations of your legs and arms. Cardiovascular disease kills more Americans than any other group of diseases. **Smoking increases the danger of cardiovascular diseases from 200% to 500% depending on how much you smoke and other factors.** If you are overweight or have high blood pressure or high blood cholesterol, these problems make the danger from smoking even higher. If you have heart disease you might not know it until you die suddenly. You may have preexisting disease which smoking would make much worse and increase your risk of dying prematurely.

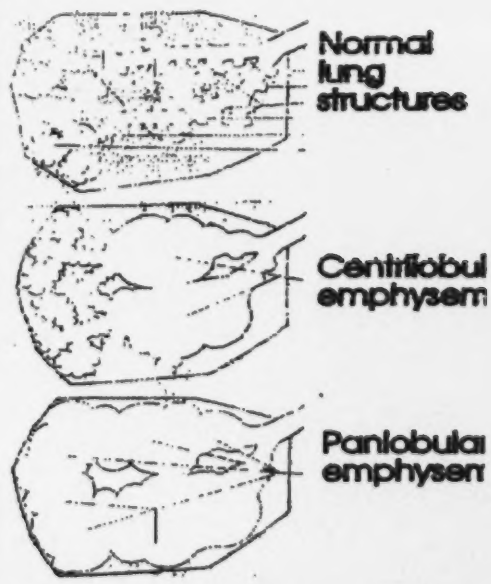


Coronary artery disease in heavy smokes and nonsmokes

DANGER. CHRONIC OBSTRUCTIVE PULMONARY DISEASE.



If you smoke cigarettes you are in danger of contracting chronic obstructive pulmonary disease or COPD. COPD is a group of diseases including **chronic bronchitis and emphysema** that permanently damage your lungs so you cannot breath well. **Emphysema** is a disease where the tissue in your lungs becomes permanently damaged. Lungs damaged by emphysema cannot absorb oxygen efficiently from the air. **Chronic bronchitis** is a disease where too much mucus is produced in your lungs. You may cough excessively and be short of breath. With emphysema or chronic bronchitis, you may need oxygen to breath. You may be extremely short of breath and be unable to do normal activities. You may be in great pain or discomfort because you cannot breath. You may die prematurely from not being able to breath.. **There is no cure for COPD.** Almost all COPD is due to smoking cigarettes. **If you smoke cigarettes you can increase your chances for getting COPD by 3,000 percent.**



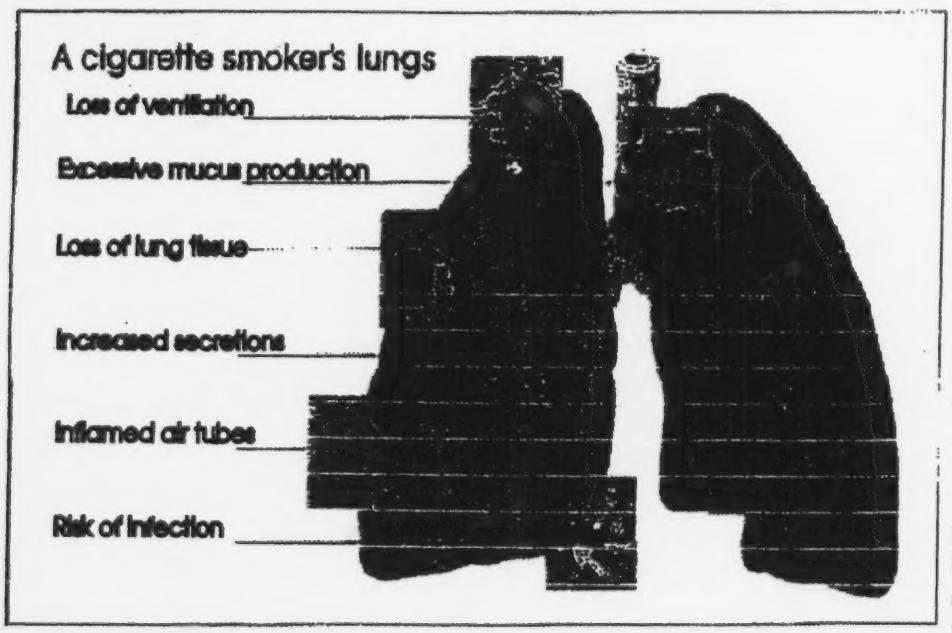
Emphysema caused by cigarettes destroys the lungs.

BEST AVAILABLE COPY

DANGER. OTHER CANCERS.

If you smoke cigarettes you are also in danger of getting **cancer of the mouth, throat, esophagus, kidney, bladder, and other parts of your body**. **Mouth cancer** includes cancer of the palate, tongue, and other parts of the mouth. These cancers are dangerous and disfiguring. **Throat cancers** include cancers of the larynx or vocal cords. **Cigarette smoking increases the danger of throat cancer by 2,500%.** If you drink alcohol and smoke, the danger of throat cancer is further increased. Treating throat cancer may require removal of your larynx. You would be unable to speak nomally, and might need to breath through a permanent hole in your throat. **Cancer of the esophagus** or food pipe is increased over 700% from cigarette smoking. This type of cancer is almost always fatal. **Cancer of the kidney** is increased over 500% from smoking. If you get cancer of the kidney, a kidney might need to be removed, or you could die from this cancer. **Cancer of the bladder** is increased over 500% in smokers. This type of cancer is difficult to treat and may be very painful or fatal. Certain industrial chemicals may also increase the danger to bladder cancer in combination with cigarettes. Other types of cancer that are caused by cigarettes include cancer of the pancreas, a disease that is almost always fatal, and possibly cancer of the stomach. All of these cancers are very serious diseases that are hard or impossible to cure.





DANGER. FETAL INJURY.

If you smoke and are pregnant you endanger the baby you are carrying. Babies born to mothers who have smoked may have **reduced mental and physical development and lower birth weight.** Low birth weight babies are at increased danger of dying or failing to develop properly. If you are pregnant you should attempt to quit smoking.



DANGER. LUNG INFECTION.

If you smoke cigarettes you are in danger of getting **lung infections including pneumonia.** Cilia are small hairlike structures in your lung that keep mucus from congesting your lungs. Cilia are paralyzed and killed by cigarette smoke. Cigarette smoke also causes your body to produce more mucus. This results in more mucus getting into your lungs. This mucus causes you to cough, particularly In the morning Excess mucus in your lungs increases the danger of lung infection including pneumonia.

DANGER. SMOKING MORE INCREASES YOUR DANGER.

Your danger of getting these serious diseases increases if you smoke more cigarettes. **Smoking more than one pack per day is twice the danger of smoking less than one pack per day. The danger of getting a cigarette related disease including cancer increases if you begin smoking at a young age.** If you start smoking before age 18 you have twice the danger. However, there is no safe level of smoking nor any safe age to begin smoking.

DANGER. SMOKE HAZARD TO OTHERS.

If you smoke at all the **smoke from your cigarette can harm children and adults.** You should never smoke around other people.

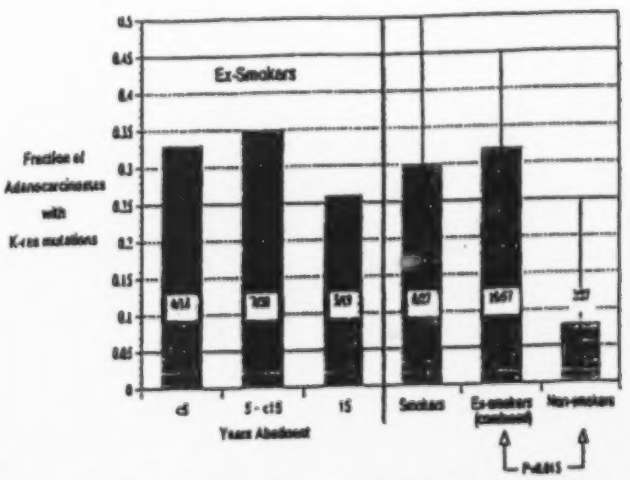
DANGER. ADDICTION.

If you begin smoking you are in **serious danger of becoming addicted to nicotine** and not being able to quit smoking. Nicotine is a poisonous drug in cigarette smoke that acts directly on the brain. **Nicotine causes a dependence or addiction,** where your body craves nicotine if deprived. If you smoke and try to quit, you may experience withdrawal symptoms including **anxiety, rapid heartbeat, nervousness, sweating, inability to concentrate,** or other physical and mental problems. You may never be able to quit smoking without feeling the effects of addiction. Addiction will be worse the more cigarettes you smoke. If you become addicted to cigarettes you should see your doctor and request counseling, nicotine replacement therapy, hypnosis, or other treatments.



DANGER: QUITTING SMOKING DOES NOT ELIMINATE DANGER.

Quitting smoking may be difficult or impossible because of the addictive nature of cigarettes. Quitting decreases the danger of cigarettes, but substantial dangers remain even after you stop smoking. **Smoking damages lung genes or DNA.** Even if you quit, this damage may never go away. Quitting smoking reduces the risk of lung cancer, but the risk remains much higher than the risk for non-smokers. You could get lung cancer many years after you quit.



SOMATIC MUTATIONS THAT LEAD TO LUNG CANCER MAY BE SUBSTANTIALLY IRREVERSIBLE. CHART SHOWS THAT 15 YEARS ABSTINENCE DOES NOT MATERAILLY REDUCE THE NUMBER OF K-RAS MUTATIONS.

DANGER: FILTERS DO NOT PROTECT YOU.

Filter cigarettes or cigarettes advertised as lower in tar and nicotine are not proven to be safer than regular cigarettes and **will not protect you from premature death and serious disease.**

DANGER. LOW YIELD CIGARETTES DO NOT PROTECT YOU.

Low tar or low nicotine cigarettes may not be less dangerous than other cigarettes. **The dangers of cancer, cardiovascular disease,and other diseases are not materially reduced when smoking low yield cigarettes.** Smokers of low yield cigarettes in much greater danger from these conditions than nonsmokers.



CANCER PRODUCED BY CIGARETTE TAR ON THE BACKS OF MICE.

DANGER: CARCINOGENS/POISONS.

Carcinogens are cancer-causing agents. **These cigarettes and the smoke from them contain numerous carcinogens which cause cancer in humans and animals.** Some of the carcinogens are: *Polyaromatic hydrocarbons* -- 11 various compounds with known animal carcinogenicity, including **benzo(a)pyrene**, a"probable" human carcinogen.. *Aza-arenes* -- four known animal carcinogens. ***N-Nitrosamines*** -- nine known animal carcinogens*Aromatic amines* -- three known carcinogens, including 2-Naphthylamine and 4-Aminobiphenyl, both known human carcinogens.*Aldehydes* -- three known carcinogens including **formaldehyde**, a suspected human carcinogen.*Miscellaneous organic compounds* -- six carcinogens, including **benzene** and **vinyl chloride**, both known human carcinogens.*Inorganic compounds* -- seven carcinogens, including **arsenic**, chromium, and **polonium-210**, all known or suspected human carcinogens. Other poisonous compounds, such as nicotine, zinc, cadmium, carbon monoxide, and others are may be associated with



other diseases, including acute toxicity, psychoactivity and addiction liability, cardiovascular disease. There may be other carcinogens in cigarette smoke. The cigarette company has not tested this product for carcinogens. **The contents of this product has never been regulated by the U.S. Government or any state or local government.**

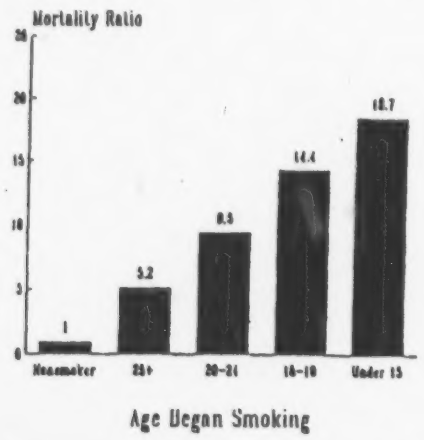


FIGURE 3.—Lung cancer mortality ratio for males by age began smoking
SOURCE: U.S. Veterans (Kahn 1966).

Lung cancer danger is greatest for those who begin young. Tell your doctor when you started to smoke.

DANGER: SECRET INGREDIENTS.

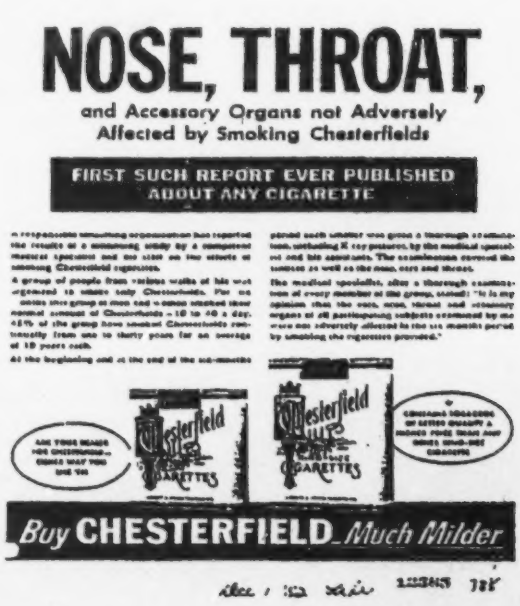
The company has added secret ingredients to these cigarettes. Neither the government nor anyone else knows what these ingredients are. They include flavorings, moisturizing agents, agents to increase the effect of nicotine on the body, and others. No one has ever tested the effects of these ingredients. They may be cancer causing and may cause other disease, and they may increase the addiction of the cigarette.

SEE A DOCTOR.

If you currently smoke, or have ever smoked, **you should immediately see a doctor and have regular physical examinations including chest x-rays and lung tests.** You should tell your doctor that you are a smoker so that he or she knows what examinations to give you. Some diseases caused by smoking may be controlled if they are diagnosed early enough.

WARNING SIGNS OF SERIOUS DISEASE.

If you smoke cigarettes, or have ever smoked cigarettes, you should be aware of **warning signs of serious diseases** that could be due to your smoking.Persistant cough or hoarseness; unusual discharge or bleeding; change indietary habits; difficulty swallowing; chest pain or weakness; disturbance of vision or equilibrium; numbness or difficulty moving in an extremity; or other warning signs as communicated by your doctor. If you ever experience any of these warning signs, or any other unusual medical symptoms, you should immediately discontinue smoking if you can, and immediately seek medical attention.


NOSE, THROAT,
and Accessory Organs not Adversely Affected by Smoking Chesterfields
FIRST SUCH REPORT EVER PUBLISHED ABOUT ANY CIGARETTE
Buy CHESTERFIELD Much Milder

DANGER: DISREGARD ADVERTISING HYPE

Cigarette advertisements often use models who appear to be healthy and enjoying life. These advertisements are designed to reassure you that smoking is not bad for you. Do not be fooled by these advertisements. Smoking is deadly. Many cigarette models have died of cancer or other diseases caused by cigarette smoking.

Disregard fraudulent health claims in advertisements, whether express as in this old advertisement, or implied in modern imagery..

FOR FURTHER INFORMATION.

You may call or write the company for further information, including copies of medical studies, government reports, a full list of ingredients in cigarettes, or to talk with someone with the company to discuss the dangers of cigarette smoking or how to go about stopping smoking.

Directions for Use

These Directions for Use are presented to you so that you can be better informed about how to properly use these cigarettes to minimize the serious health hazards you face if you smoke. Read this information carefully. *Your life may depend on it.*

THERE IS NO SAFE WAY TO SMOKE

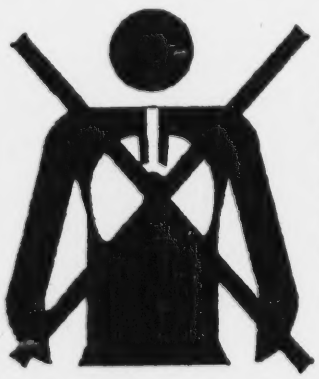
There is no safe method of smoking nor any safe number of cigarettes you may smoke without hazard to your health. Any amount of smoking is hazardous. If you want to eliminate the danger from smoking you must not smoke.



For help in quitting smoking see your doctor

HOW TO QUIT SMOKING

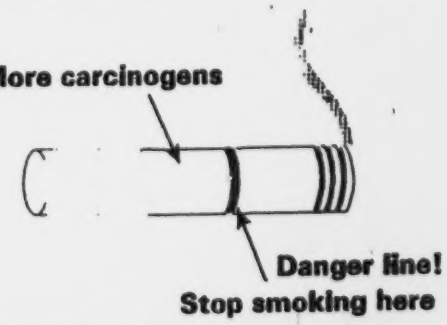
To eliminate the hazard from smoking you must stop smoking. Stopping smoking may be very difficult because of physiological and psychological compulsions to continue smoking. **You may need to see a doctor or other health care professional to aid you in stopping smoking.** Nicotine is an addictive drug and your body will crave nicotine if you stop smoking. **You should expect withdrawl symptoms including nervousness, anxiety, sleep impairment, and other symptoms.** Some of these symptoms may be controlled by nicotine replacement therapy. In addition, you may require behavior modification, including counseling, hypnosis, acupuncture, aversion therapy, or other types of therapy. If you succeed in stopping smoking, you may nonetheless relapse. Relapse rates are very high among former smokers. **You should work with a health care professional to avoid relapse.** You should keep trying to stop smoking even if you have failedat prior attempts.



Don't Inhale Cigarettes

HOW TO REDUCE SMOKING HAZARDS.

There is no way to eliminate the hazards of serious disease if you continue to smoke. If you cannot stop smoking, you should attempt to reduce the hazards of smoking as much as you possibly can. To reduce smoking hazards, you should smoke fewer cigarettes, avoid or minimize inhalation, smoke each cigarette to a longer butt length, smoke only ventilated-filter ultra low-eld cigarettes, identify the vent holes in ventilated cigarettes and avoid blocking them, and otherwise reduce the amount of smoke taken into your lungs.



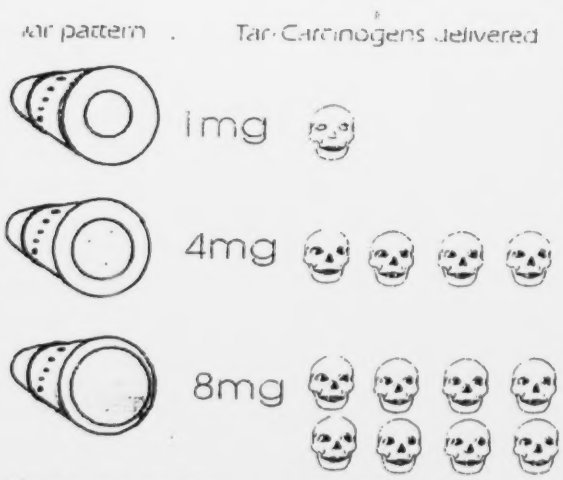
Don't Smoke Cigarettes Past the Danger Line

SMOKE FEWER CIGARETTES

Danger from lung cancer and other cigarette related diseases is related to **how many cigarettes you smoke.** You should attempt to smoke as few cigarettes as possible. Do not buy cigarettes by the carton. Cigarettes should not be kept in view. You should never light a cigarette with another. Try to count the cigarettes you smoke and smoke less each day if possible.

DON'T INHALE.

Greater inhalation of each cigarette increases the hazard of smoking related diseases. Cigar and pipe smokers have a lower rate of lung cancer than cigarette smokers in part because they do not inhale as often. **You should avoid inhaling the smoke from these cigarettes.** If you inhale, you should not inhale deeply. You should also avoid deep puffing, because deep puffing increases the burning temperature of the cigarette and may contribute to the production of carcinogens in the smoke.



Dark tar patterns mean dangerous smoking habits

SMOKE TO LONGER BUTT LENGTH

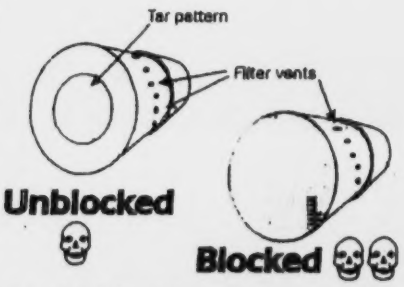
Carcinogens and other harmful ingredients of cigarettes are deposited on the tobacco rod as you smoke. As you continue to smoke, you release more and more harmful substances into the smoke. **You should stop smoking the cigarette before the butt becomes too short.** The Federal Trade Commission tests for tar and nicotine in cigarettes. The testing machine smokes the cigarette to a 23mm butt length. To duplicate the FTC yields you must stop smoking at this length. You should try to stop smoking with as much butt length as possible.

SMOKE VENTILATED-FILTER ULTRA LOW-YIELD CIGARETTES.

Although there is no safe cigarette, you may reduce the health hazards somewhat by **smoking only cigarettes with ventilated filters, with published ultralow yields of tar and nicotine.** Smoking only these cigarettes may reduce the danger from lung cancer by a small amount. The dangers from cardiovascular diseases and other diseases may not be reduced at all.

AVOID COMPENSATORY SMOKING.

Compensatory smoking may occur if you smoke a ventilated filter, ultralow yield cigarette. Compensatory smoking means you attempt to get more smoke and nicotine by smoking more cigarettes, smoking the cigarettes with deeper inhalation, smoking the cigaretttes to a shorter butt length, or using all of these techniques. **Compensatory smoking increases the dangers from smoking.** You should become aware of compensatory smoking and avoid it. You can tell if your smoking is compensatory by looking at the tar stain on the filter. A dark stain indicates compensatory smoking.



Avoid blocking filter vents. Inspect tar patterns

AVOID BLOCKING VENT HOLES

Many cigarettes have ventilated filters. These holes allow outside air to dilute the smoke. Some holes are hard to see. You may intentionally or unintentionally block these holes while smoking. This would result in much greater amounts of smoke in your lungs, increasing the dangers of cigarette diseases. Identify the vent holes in these cigarettesandavoid blocking them.

SEE YOUR DOCTOR.

If you are currently smoking, in any amount, or if you have ever smoked in your lifetime, you should immediately see your doctor and inform him or her that you have smoked cigarettes. You doctor can test you for serious smoking related disease.

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MAY 16 2001
OFFICE OF THE CLERK

(2)

No. 00-1604

IN THE
Supreme Court of the United States

BROWN & WILLIAMSON TOBACCO CORPORATION,
AS SUCCESSOR BY MERGER TO THE
AMERICAN TOBACCO COMPANY,
Petitioner,

v.

GRADY CARTER AND MILDRED CARTER,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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May 2001

QUESTION PRESENTED

In an individual lawsuit in which evidence was presented that a defendant tobacco company failed to warn the plaintiff of the adverse health effects of its cigarettes beginning in the late 1940's, should this Court review a decision of the Florida Supreme Court holding that an expert's testimony concerning the efficacy of a hypothetical cigarette package insert is not preempted by the Federal Cigarette Labeling and Advertising Act, where

(1) the defendant concedes that the ruling below accurately states applicable preemption principles under the Act as set forth by the Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992);

(2) the Act preempts only state-law failure-to-warn claims concerning a defendant's *post-1969 conduct*;

(3) the trial court instructed the jury that failure-to-warn liability could not be based on post-1969 evidence;

(4) the expert did not at any time testify that the hypothetical package insert should have been used post-1969; and

(5) no other federal or state court has ever considered whether the Act preempts testimony regarding package inserts or other cigarette labeling.

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STATEMENT OF THE CASE

Respondent Grady Carter began smoking unfiltered Lucky Strike cigarettes in 1947, when he was 16 years old. He continued to smoke Lucky Strikes until 1972, when he switched to a different brand of cigarettes, which was not the subject of the litigation below. Rec. 53: 2144-45, 2148. Mr. Carter contracted lung cancer in 1991, and, in early 1995, he and his wife, Mildred, filed a complaint for damages against petitioner alleging various negligence and strict liability theories, such as breach of warranty and product defect. The theory urged by the Carters that is the subject of the petition is that, prior to July 1, 1969, petitioner failed to warn Mr. Carter of the dangers of its product.

Petitioner's principal defenses at trial were (1) no negligence in failing to warn pre-1969; (2) lack of causation; (3) no defect; (4) no addiction; and (5) statute of limitations. Rec. 38: 417-65. In addition to those defenses, prior to trial, petitioner moved for partial summary judgment, seeking a ruling that all communications by petitioner post-July 1, 1969 were inadmissible as support for the Carters' failure-to-warn claim. It claimed that the admission of such evidence was preempted by 15 U.S.C. 1334(b), the preemption provision of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), which became effective on July 1, 1969. The trial court, relying on this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), held that

> to the extent the plaintiffs' failure to warn claims rely upon the adequacy or inadequacy of post-1969 advertising or promotions regarding cigarettes they are preempted by 15 U.S.C.A. § 1334. To the extent such claims rely upon the adequacy or inadequacy of communications unrelated to advertising or promotion, they remain viable.

Cert. App. 45a.

At trial, petitioner raised the preemption issue again, this time in an effort to bar all testimony from Dr. Allan Feingold, the Carters' expert who testified about a hypothetical cigarette package insert that he claimed demonstrated the efficacy of warning smokers of tobacco's ill effects. The trial court ruled that Dr. Feingold's testimony was admissible as evidence of a potential pre-July 1, 1969 warning, but not with regard to the time period thereafter (Rec. 45: 1160), and instructed the jury accordingly based on an instruction requested by petitioner. Rec. 66: 4143-44; *see* Defendant's Requested Jury Instruction No. 13, Rec. 15: 2459.

The jury returned a verdict in favor of the Carters and awarded damages. On appeal, the Florida First District Court of Appeal reversed, primarily holding that the Carters' claims were barred by the statute of limitations and, alternatively, that the trial court erred in admitting evidence that was preempted by the FCLAA.

The Carters then sought and obtained discretionary review by the Florida Supreme Court, which, on November 22, 2000, reinstated the jury's verdict. After a careful review of the factual record, the Florida Supreme Court disagreed with the district court's conclusions that the trial court erred, both on the principal issue on appeal concerning the statute of limitations and on the preemption question, which was the only federal issue in the case. Regarding preemption, the court made a factual determination from its review of the record that the Carters' claims were clearly limited to injuries that resulted from petitioner's failure to provide adequate warnings *prior* to July 1, 1969. Thus, the court held that error, if any, concerning what constitutes "advertising or promotion" in the trial court's

ruling on the motion for partial summary judgment was harmless. Cert. App. 18a. Similarly, the Florida Supreme Court made the additional factual determination that the hypothetical package insert testified to by Dr. Feingold was offered only to support the Carters' pre-1969 failure-to-warn claim. Cert. App. 20a. Finally, the court held, alternatively, that the jury was presumed to have followed the instructions given them, which, as noted above, included an instruction limiting the Carters' failure-to-warn claim to the pre-July 1, 1969 period. Cert. App. 20a-21a.

REASONS FOR DENYING THE WRIT

The petition should be denied for two independent reasons. **First**, the petition relies on false factual premises that are fundamental to the claim for review. The petition asserts that (1) plaintiffs' expert testified that his hypothetical package insert should have been used to warn consumers after 1969, and that (2) the Florida Supreme Court affirmed a trial court ruling that had allowed the jury to decide the meaning of the term "advertising or promotion" as used in the FCLAA's preemption provision. As explained below, neither of these assertions is true.

Second, even assuming the truth of the facts upon which the petition is based, review should be denied. The no-preemption ruling below involves a mundane application of the facts to settled preemption law properly stated by the Florida Supreme Court. As a result, the petition does not point to a split in lower court decisions requiring this Court's resolution and none exists.

A. The Key Factual Premises Upon Which The Petition Are Based Are False.

To understand the factual distortions underlying the petition it is necessary first to review several undisputed propositions:

(i) One of several claims alleged by the Carters is that petitioner failed to warn Mr. Carter of the dangerous propensities of its cigarettes.

(ii) In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court held that, with regard to conduct that occurred prior to July 1, 1969, the FCLAA does not preempt any state-law damages claims, including a failure-to-warn claim; however, for conduct occurring after July 1, 1969, state-law failure-to-warn claims "based on smoking and health" "with respect to the advertising or promotion of any cigarettes" are preempted.

(iii) The trial court in this case gave the following jury instruction tracking the Court's ruling in *Cipollone*:

> Since January 1, 1966, federal law has required specific warnings to appear on packages of cigarettes sold in the United States. There is no claim in this case that The American Tobacco Company's cigarettes were not labeled in accordance with this statute.
>
> The federal law does not limit the liability of defendant against the claim of a failure to warn before July 1, 1969. However, you may not base any finding of liability on a determination that after July 1, 1969, the defendant should have included additional or more clearly stated warnings in the advertising or promotion

> of its cigarettes or that the defendant, through its advertising or promotional activities, neutralized, minimized, or undermined the effect of the federally mandated warnings during that time.

Rec. 66: 4143-44. This instruction is almost verbatim the preemption instruction requested by *petitioner*. *See* Rec. 15: 2459 (Defendant's Requested Jury Instruction No. 13, *citing Cipollone*). Petitioner requested no other instruction regarding preemption.

With the foregoing undisputed propositions in mind, we now turn to the particular points raised in the petition. Petitioner asserts that the admission of Dr. Feingold's testimony violated *Cipollone* in two respects. The factual premise for each assertion is false.

1. Petitioner first claims that the Carters' counsel "elicited expert testimony from Feingold that th[e] package insert should have been used to warn consumers of the risks of smoking, including during the time period after 1969." Pet. 5; *see also id.* at 17 (castigating the Florida Supreme Court for its purported "decision to permit the imposition of tort liability upon petitioner for failure to warn, after 1969"). To support this assertion, petitioner cites three pages from the massive trial transcript in this case. *See id.* at 6 (citing Rec. 45: 1153; Rec. 48: 1509; Rec. 49: 1536). A review of those three pages shows that petitioner's assertion is a complete invention. Dr. Feingold never stated that the hypothetical package insert should have been used post-1969, and neither Dr. Feingold nor any other witness ever suggested that the insert could be used to impose liability on petitioner for its post-1969 conduct. In fact, Dr. Feingold's testimony regarding the insert was focused on the time period prior to July 1, 1969. *See, e.g.*, Rec. 45: 1162-63 (package insert should have been used no later than 1953); Rec.

46: 1349-50; Rec. 48: 1494-95, 1501-03 (criticism of adequacy of 1966 warning label); Rec. 47: 1468-69 (package insert should have been used in 1965 when cigarette manufacturers confirmed that cigarette smoke condensate causes cancer in animals). That his testimony concerned the period pre-July 1, 1969 is underscored by the side-bar conference immediately prior to Dr. Feingold's testimony concerning the package insert at which (i) petitioner's counsel objected to the anticipated testimony in its entirety on preemption grounds (Rec. 45: 1158), (ii) the Carters' counsel assured the court that the testimony was offered only with regard to the efficacy of a pre-1969 warning and that his clients stipulated that the failure-to-warn claim was so limited (Rec. 45: 1159), and (iii) the trial judge overruled the objection, noting that he would instruct the jury as to what evidence should and should not be considered (Rec. 45: 1160). As the Florida Supreme Court explained:

> The defense objected, arguing that the package insert was preempted by the 1969 Act. The Carters' counsel argued at sidebar that the insert was only being offered to support the Carters' pre-1969 claims. The trial court overruled the defense's objection and permitted the introduction of the insert, but assured the defense that the jury would be specifically instructed regarding which dates to be considered by them with respect to warnings. Subsequently, at the end of the trial, the trial court gave the jury the [instruction set out above].

Cert. App. 20a.

Even prior to being given this instruction, the jury could not possibly have been confused on the temporal limit of the Carters' failure-to-warn claim. In addition to Dr. Feingold's testimony discussed above and the jury instruction, the parties' opening and closing statements made clear that the claim was

limited to pre-1969 conduct. *See, e.g.*, Rec. 38: 351-52, 398-99 (plaintiffs' opening: "damage was done to Mr. Carter's lungs from '47-'66"); Rec. 38: 421 (defendant's opening: "There's no claim in this case that after 1969 the warnings on the package were anything but adequate. So what we're focusing on is a period before 1969"); Rec. 65: 4003 (defendant's closing, characterizing Mr. Carter's claim: "He says if a warning had been given by the [defendant] before 1969 he would have avoided his cancer"); Rec. 65: 4009 (defendant's closing: "In evaluating whether a manufacturer has a duty to warn at any relevant time — the relevant time here is before 1969 obviously"). These statements are consistent with the fact that, as the jury was instructed (Rec. 66: 4127-28), Mr. Carter smoked petitioner's cigarettes from 1947 to 1972. Therefore, Mr. Carter had little reason to rely on post-1969 conduct, even on his design-defect and other claims that escape preemption under *Cipollone* regardless of the time period involved.

Nevertheless, petitioner complains that "[t]here was never a limitation either in respondents' questions or in their expert's testimony, which suggested that the insert was required only in the pre-1969 period" (Pet. 6), but does not maintain that federal law required the Carters' lawyers and witnesses to preface each of their utterances with an admonition concerning *Cipollone*'s pre-1969/post-1969 dichotomy. Any such assertion would be frivolous. As noted above, the preemption instruction given by the trial court was proposed by *petitioner*, and petitioner never asked for additional preemption instructions or for a question-by-question temporal limitation. The frequency and placement of limiting instructions are matters of state, not federal, law and therefore are not properly before this Court. In any event, on that state-law question, the Florida Supreme Court properly held that the limiting instruction was sufficient, noting that "juries are presumed to follow the instructions given them." Cert. App. 21a (citing Florida case law).

2. Petitioner next claims that review should be granted because the Florida Supreme Court improperly affirmed a trial court ruling that allowed the jury to decide the meaning of the term "advertising or promotion" as used in the FCLAA's preemption provision, 15 U.S.C. 1334(b). To be blunt, this argument is pure fantasy: Petitioner does not, because it cannot, cite any place in the record where the Carters ever suggested that a package insert, such as the hypothetical drawn up by Dr. Feingold, would escape preemption because it was not "advertising or promotion" under section 1334(b). To the contrary, the parties understood that post-1969 failure-to-warn liability based on health information on or accompanying the cigarette package is preempted; the only question raised about preemption during the trial was the pre-1969/post-1969 dichotomy, which was dealt with correctly by the trial court when it gave the *Cipollone* jury instruction. Thus, contrary to petitioner's assertion, the jury was never asked to decide whether the hypothetical package insert, or any other evidence, was "advertising or promotion" under section 1334(b). That fact is clear from the side-bar colloquy discussed above, in which the parties agreed that Dr. Feingold's testimony concerning the package insert could be considered by the jury only in support of the Carters' pre-1969 failure-to-warn claim. Rec. 45: 1157-60.

Petitioner's attempt to raise the "advertising or promotion" issue by reference to the trial court's April 4, 1996 pre-trial ruling on petitioner's motion for partial summary judgment is spurious. In that motion, petitioner argued in the abstract that "*Cipollone* Requires Dismissal of Plaintiffs' Post 1969 'Failure-to-Warn Claims'," but did not ask for the exclusion of any particular type of evidence. *See* Defendants' Mem. Of Law in Support of Their Motion for Summary Judgment, at 7 (Mar. 15, 1996), Rec. 2: 362. The court granted the motion in part, agreeing with the parties that to the extent

that the Carters' failure-to-warn claim relied on the adequacy or inadequacy of post-1969 advertising or promotion of cigarettes, it was preempted by the FCLAA. Cert. App. 45a. The trial court did not purport to address whether any specific testimony or other evidence concerning hypothetical package inserts would invade the preempted domain of "advertising or promotion," because neither Dr. Feingold's testimony nor the insert was yet before the court. Thus, petitioner is flatly wrong that the trial court's partial summary judgment "decision paved the way for the Carters to introduce a proposed package insert" (17a). The trial court's ruling simply had nothing to do with package inserts or Dr. Feingold's testimony and petitioner cites nothing in the record suggesting that it did. To the contrary, when Dr. Feingold's testimony and hypothetical package insert were later presented at trial, the parties did not dispute that this evidence related to "advertising or promotion," and that therefore it was relevant only to the pre-1969 period. Rec. 45: 1157-60.[1]

---

[1] Petitioner seeks to transform its "advertising or promotion" argument into a separate basis for review by claiming that review should be granted because the Florida Supreme Court's affirmance of the trial court's ruling on the motion for partial summary judgment permitted the jury to decide an issue of federal law, *i.e.* the preemptive effect of the FCLAA on the hypothetical package insert. Pet. 25. However, the trial court's alternative ruling — that, under *Cipollone*, there may be forms of communication that escape preemption because they are not "advertising or promotion" (Cert. App. 45a) — never became relevant at trial, because the Carters did not contend that the hypothetical package insert was not "advertising or promotion." Thus, as explained in the text, the jury did not decide anything regarding preemption, and

(continued...)

* * *

In sum, there is simply no factual basis for the fundamental claim upon which the petition is based — that Dr. Feingold's testimony was used to impose post-1969 failure-to-warn liability. Review should be denied on that ground alone.

B. Even Assuming A Factual Basis For The Petition, The Petition Should Be Denied Because The Florida Supreme Court Applied Settled Legal Principles In Harmony With The Rulings Of Other Courts.

Even assuming that the petition has some factual basis, and that, in fact, the jury could have believed that Dr. Feingold's testimony was a basis for imposing post-1969 liability, the petition should be denied. The petition does not dispute that the Florida Supreme Court understood, and properly stated, the applicable legal principles. Cert. App. 15a-16a (discussing *Cipollone*). Thus, even if the factual premises for the petition are accurate, the only question would be whether, on the unique facts of this particular case, admission of Dr. Feingold's testimony violated established preemption principles. Review of the decision below would thus involve asking whether the Florida Supreme Court misapplied *Cipollone* when it allowed the jury to consider post-1969 evidence, *i.e.*, a classic situation where review is inappropriate.

---

[1](...continued)
certainly was not instructed to decide whether the hypothetical insert was "advertising or promotion," because that was not an issue in the case. Instead, as explained above, the jury was properly instructed under *Cipollone* and asked only to apply the facts to the relevant legal principles.

See S. Ct. Rule 10 (review "rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law").

Petitioner seeks to evade that basic problem by asserting that the decision below "directly conflicts" with *Cipollone* and federal and state case law. Pet. 16. That assertion is incorrect. Petitioner's canvass of the post-*Cipollone* case law at pages 17 to 19 of the petition serves only to underscore the highly idiosyncratic nature of the alleged issue here: the admissibility of an expert's testimony concerning a hypothetical package insert. Petitioner does not cite a single case concerning that question or one remotely like it, which reflects the fact that a ruling by this Court on the merits would resolve nothing beyond this particular case.

The cases cited in the petition demonstrate post-*Cipollone* unity among the courts, rather than conflict. As the parenthetical accompanying each citation indicates, the cases upon which petitioner relies stand for the unremarkable proposition that post-1969 failure-to-warn claims dealing with "advertising or promotion" are preempted by federal law. *See, e.g.*, Pet. 17 (quoting Fifth Circuit case stating that claims "based on fraudulent concealment or a failure to warn after 1969 ... are preempted by the" FCLAA), Pet. 18 (citing Texas Supreme Court case to the effect that post-1969 claims regarding cigarette advertising or promotional materials are preempted). These general statements of applicable preemption law, taken directly from *Cipollone*, are precisely the same formulation stated by the Florida Supreme Court below (Cert. App. 15a-16a) and included in the jury instruction.

The only cases that petitioner describes in any detail are federal district court decisions from Florida, Alabama, and New Jersey. Because those cases are not binding precedents even in

their own courts, let alone in the circuit courts, they do not provide a basis for review. *See* S. Ct. Rule 10. In any event, those cases are not at odds with the decision below. As the petition indicates (at 19), in *Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 419 (S.D. Fla. 1996), the court construed "advertising or promotion" to include public service messages and seminars. Although rather broad, that ruling has nothing to do with this case, in which the jury was never asked to consider anything other than the efficacy of a package insert, which no one contended fell outside the FCLAA's definition of "advertising or promotion." Although it may be true that "[u]nder *Sonnenreich*," the hypothetical package insert prepared by Dr. Feingold "could not form the basis for a post-1969 failure to warn claim," Pet. 19-20, that conclusion flows not from the definition of "advertising or promotion" but from *Cipollone*'s basic pre-1969/post-1969 dichotomy, which was properly stated (and applied) by the court below. As explained in Part A above, the Carters never sought to impose liability on the ground that petitioner had a post-1969 duty to warn.

Lacey v. Lorillard Tobacco Co., 956 F. Supp. 956 (N.D. Ala. 1997), which involved only post-1969 claims, *id.* at 961 n.1, is to the same effect. According to petitioner, *Lacey* stands for the undisputed proposition that "a plaintiff's claim based upon an alleged duty of defendants to provide to consumers more information regarding smoking and health than is required by the [FCLAA] is preempted." Pet. 20 (quoting *Lacey*, 956 F. Supp. at 964). Although petitioner asserts that *Lacey* is important because it broadly defines "advertising or promotion," that point, as noted above, is irrelevant, because the Carters' failure-to-warn claim does not call for a contrary

interpretation of "advertising or promotion."[2]

Following this Court's decision in *Cipollone*, the lower courts agree that failure-to-warn claims concerning cigarette advertising or promotion escape preemption if they are premised on conduct prior to 1969, but are preempted if they are premised on conduct after 1969. No post-*Cipollone* court has misunderstood that basic point, as the petition itself makes abundantly clear. The jury was properly instructed on that issue, and the Florida Supreme Court's opinion accurately states it as well.

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[2]For the same reason, *Griesenbeck v. American Tobacco Co.*, 897 F. Supp. 815 (D.N.J. 1995), upon which *Lacey* relied, is also irrelevant.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In The

Supreme Court of the United States

BROWN & WILLIAMSON TOBACCO CORPORATION,
AS SUCCESSOR BY MERGER TO THE
AMERICAN TOBACCO COMPANY,

Petitioner,

v.

GRADY CARTER AND MILDRED CARTER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In an attempt to divert attention away from the Florida Supreme Court's critical misapplication of the preemption provisions of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1334, and this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), respondents have sought to reinvent the Florida Supreme Court's ruling and the factual record in this case. However, respondents' mischaracterization of the facts cannot diminish the legal errors made by the Florida Supreme Court when it upheld the trial court's admission of respondents' package insert and their expert's testimony that such an insert should have been included in cigarette packages to provide additional health warnings to cigarette smokers without regard to any limitation to the pre-July 1, 1969 time period, as the FCLAA and *Cipollone* require. The Florida Supreme Court compounded this violation of federal law by affirming the trial court's ruling allowing the jury to impose liability on petitioner based on expert testimony that such an insert should have been included in cigarette packages after July 1, 1969, again in contravention of the FCLAA and *Cipollone*.

I. THE FLORIDA SUPREME COURT VIOLATED THE FCLAA AND *CIPOLLONE* BY UPHOLDING THE ADMISSION OF EVIDENCE THAT ADDITIONAL CIGARETTE HEALTH WARNINGS SHOULD HAVE BEEN PROVIDED TO RESPONDENTS OTHER THAN THE HEALTH WARNINGS MANDATED BY CONGRESS.

Respondents attempt, in their opposition, to disassociate the verdict from the strategy that achieved it,

i.e., their attack on the adequacy of all the cigarette health warnings Congress ever mandated, including those in the preempted post-1969 era. Respondents' efforts do not, however, alter the fact that at trial, respondents elicited testimony from their expert, Dr. Allan Feingold, that his proposed package insert should have been utilized by petitioner to warn cigarette smokers of the health risks of smoking at all times – *i.e.*, both before and after July 1, 1969.

Respondents erroneously contend, *inter alia*, that (1) the trial court ruled that Feingold's testimony was admissible as evidence of a health warning for the pre-1969 time period, but not after 1969 (Br. in Opp. 2); (2) the trial court held that respondents' claims were limited to injuries allegedly sustained as a result of a pre-1969 failure to warn (Br. in Opp. 2); (3) Feingold never expressly stated that his package warning insert should have been employed after 1969 (Br. in Opp. 5); and (4) respondents stipulated at trial that their failure to warn claim was limited to petitioner's pre-1969 conduct. Br. in Opp. 6.

These "contentions" are not supported by the Florida Supreme Court's decision. At no point did the trial court rule, or did the Florida Supreme Court hold, that Dr. Feingold's package insert and his testimony thereon were limited to the nonpreempted, pre-1969 time period. On the contrary, all the trial court did (and all the Florida Supreme Court approved) was to overrule petitioner's objection that the package insert and its attendant testimony violated the FCLAA's preemption provisions, as interpreted by *Cipollone*. (Rec. 45:1157-60.) Feingold was then permitted to testify about petitioner's alleged failure to warn of the health risks of smoking, and utilize his

package insert, without ever limiting that testimony to the pre-1969 era. (Rec. 49:1536-47.) Since petitioner's objection was *overruled*, respondents' assertion that the package insert and the testimony about it was *limited* to the pre-1969 era misrepresents the legal rulings made below.

Similarly, neither the trial court nor the Florida Supreme Court ever made any "factual determination" (Br. in Opp. 2, 3) that the respondents' claims were limited to injuries arising from pre-1969 conduct. First, despite respondents' attempt to (mis)cast the issue as merely implicating a factual dispute, this "determination" would necessarily constitute a legal, not factual, ruling based on the dictates of the FCLAA and *Cipollone*. But no legal determination was ever made (either by the trial court or the Florida Supreme Court) that "[respondents'] claims were clearly limited to injuries that resulted from petitioner's failure to provide adequate warnings *prior* to July 1, 1969." Br. in Opp. 2. On the contrary, the trial court specifically *refused* to make such a determination, leaving the issue for the jury to decide, and the Florida Supreme Court upheld this decision.

Second, petitioner's objections to the package insert and the expert testimony about it were based on these very grounds, *i.e.*, that under § 1334(b) and *Cipollone*, respondents' failure to warn claims should be confined to the pre-1969 time period. (Rec. 45:1158.) These objections, of course, were overruled. (Rec. 45:1160.) It is untenable and disingenuous for respondents to now dress themselves in the robes of *Cipollone* and the FCLAA, when petitioner's motion for partial summary judgment based

on preemption was denied, and when the trial court overruled petitioner's objections to the package insert.

In fact, were respondents to examine the record with an unjaundiced eye, they would concede that they attacked the adequacy of the post-1969 health warnings from the very commencement of trial until its close. In his opening statement to the jury, respondents' counsel attacked the adequacy of the warning prescribed by the 1969 amendments to the FCLAA:[1] "[T]hat just says it's dangerous, but it doesn't say how much. It doesn't say what or how, whatever." (Rec. 38:399.) While displaying to the jury the names of over thirty (30) carcinogens unknown until 1989 (Rec. 38:396; *see also* Rec. Pl. Exh. 21, 1989 Surgeon General's Report, at 85-87) and all the warnings mandated by Congress in 1965, 1969 and 1984 (Rec. 38:398-99), counsel advised the jury: "Known carcinogens . . . that have *never* been put on the label"; "Why hasn't it *ever* been put on the label?"; "There is no excuse"; "It's been hidden largely and it's *never* been publicized." (Rec. 38:396) (emphasis added).

Respondents' expert, Dr. Feingold, thereafter testified that all the warnings ever mandated by Congress were inadequate. Those warnings required in 1966, for example, were "very inadequate." (Rec. 48:1501-02.) "It was not until 1984," Feingold testified over objection, that

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[1] The 1969 FCLAA required the following warning to be placed on all cigarette packages sold in the United States: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Pub. L. 91-222, 84 Stat. 87 (1970).

the word "cancer" was required in the federally-mandated warnings (Rec. 48:1507-08), and that no package insert has "ever" been utilized which "discusses the dangers of cigarettes in detail." (Rec. 48:1509.) To remedy these "inadequate" warnings, including those appearing on cigarette packages after July 1, 1969, Feingold commended to the jury his package insert, which he described as "what I would like patients to be confronted with when they open a package of cigarettes." (Rec. 49:1536.) The package insert (*see* Pet. App. 48a-54a) contained far more warning information than Congress has ever required. Via the package insert, Feingold advised warning that, *inter alia*, quitting smoking does not eliminate health dangers, that filtered and low-yield cigarettes do not prevent disease, and that cigarette smoking should be limited. Pet. App. 51a, 53a. The insert also listed the chemicals purportedly in cigarette smoke and instructed people how to smoke. Pet. App. 51a, 54a.

Of critical import, of course, is the fact that nowhere in Feingold's testimony about the package insert, or in the insert itself, was there even a suggestion that the package insert was required only in the pre-1969 time period. Neither respondents' counsel nor their expert witness ever provided any time limitation in their attacks, using the insert, on petitioner's alleged failure to warn. It is therefore pure sophistry for respondents to argue that "the jury could not possibly have been confused on the temporal limit of the [respondents'] failure-to-warn claim." Br. in Opp. 6. While the jury may have been instructed that it was not to find liability based on petitioner's alleged failure to warn through its advertising or promotion after 1969 (Pet. App. 20a), the trial court also

permitted the jury to receive evidence about petitioner's alleged warning failures that stretched far beyond July 1, 1969, and that condemned the post-1969 federally-mandated warning labels. The court's refusal to enforce the preemptive effect of the FCLAA and *Cipollone*, which was affirmed by the Florida Supreme Court, constituted legal error, notwithstanding, or perhaps because of, the court's instruction.

Indeed, this legal error was only exacerbated when the trial court permitted the jury to determine whether the package insert was a form of "advertising" or "promotion" as defined by the FCLAA, rather than deciding the issue as a matter of law, as a myriad of other courts have done. *See* Pet. 16-21. While the jury instruction merely informed the jury that there was no claim after 1969 that petitioner should have included "additional or more clearly stated warnings in the advertising or promotion of its cigarettes" (Pet. App. 20a), the trial court's decision that "a genuine issue of material fact exist[ed] regarding the general usage of the terms 'advertising or promotions' " (Pet. App. 46a) compelled it to submit the interpretation of those terms to the jury. When the Florida Supreme Court upheld that ruling, it insured that the instruction's only effect would be to permit the jury to decide the preemptive effect of the FCLAA with regard to respondents' package insert. Thus, the court's instruction, rather than limiting respondents' failure to warn claim to the pre-1969 era, instead gave the jury the authority to determine whether the package insert even fell within the preemption ambit of the FCLAA and *Cipollone*. This was clear error, as it failed to give proper effect to the preemptive effect of federal law.

Respondents, realizing the court's error, now state that the trial court's ruling that the meaning of "advertising" or "promotion" was a question of fact "never became relevant at trial, because [respondents] did not contend that the hypothetical package insert was not 'advertising or promotion.' " Br. in Opp. 9, n.1. On what ground, then, was petitioner's objection to the package insert and to Feingold's testimony overruled? Respondents' contention is simply a gross mischaracterization.

Indeed, respondents' claim that the denial of petitioner's motion for partial summary judgment based on preemption "had nothing to do with package inserts" (Br. in Opp. 9) is palpably untrue. In their opposition to petitioner's motion, respondents claimed that there were "numerous methods of communication that are not advertising or promotion of cigarettes," and listed, *inter alia*, "[o]ther methods of communication that are the subject of expert testimony." (Rec. 4:484-85.) *Respondents then attached as an exhibit to their opposition to petitioner's motion for partial summary judgment the very same package insert that they introduced at trial.* (Rec. 4:478-608, App. V.) In addition, in the interrogatory responses they used to oppose petitioner's motion, respondents stated that "[t]he above warnings," including the information presented on the package insert, "should have been given *on packages of cigarettes [or] in packages via printed inserts,*" without limitation to the pre-1969 time period. (Rec. 4:487.)

Accordingly, any present assertion by respondents that they did not cast the package insert as outside the FCLAA's definition of "advertising" or "promotion" is simply an attempt to distance the verdict from their own

strategy, as well as from the legal errors that contributed to it.

II. THE FLORIDA SUPREME COURT'S RULING THAT UPHELD THE TRIAL COURT'S DECISION ADMITTING THE PACKAGE INSERT AND PERMITTING THE JURY TO DECIDE THE PREEMPTIVE SCOPE OF THE FCLAA DIRECTLY CONFLICTS WITH THE FCLAA, *CIPOLLONE*, AND ESTABLISHED CASE LAW.

Respondents argue that, at most, the Florida Supreme Court merely "misapplied *Cipollone* when it allowed the jury to consider post-1969 evidence." Br. in Opp. 10. This again misstates the rulings of that court and the effect of those rulings. The Florida Supreme Court did not simply "misapply" the dictates of *Cipollone* and the FCLAA. Rather, it completely ignored those dictates by upholding the trial court's ruling permitting the jury to hear evidence without limitation to the pre-1969 time period, and compounded that error by affirming the trial court's ruling allowing the jury to determine whether that evidence constituted "advertising" or "promotion" within the meaning of the FCLAA. This directly contravenes not only *Cipollone*, but other state and federal courts that have directly confronted this issue.

Respondents urge that the Florida Supreme Court's decision does not conflict with *Cipollone* and its progeny because none of those cases addressed the admissibility of expert testimony concerning a package insert warning. Br. in Opp. 11. However, the issue before this Court is not only whether a state's highest court approved the admission of a package insert and accompanying testimony

that challenged the adequacy of post-1969 federally-mandated warnings (although this error conflicts with well-established preemption precedent and alone warrants review). The issue that also merits review is the Florida Supreme Court's submission of the FCLAA's interpretation to a jury.

As the petition details, it is the duty of courts, not juries, to enforce this Court's interpretation of federal law. Pet. 22-23. Petitioner has cited various federal and state court cases in which the interpretation of the FCLAA has been undertaken by these courts as a matter of law, in consonance with this Court's action in *Cipollone*. Pet. 16-21. In none of these cases, and in no case proffered by respondents, did a court determine that the construction of § 1334(b) presented a fact issue for jury resolution. Rather, as these and other cases hold, the interpretation of the applicability of a federal preemption provision must be accomplished by a court. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 214 (1985); *Penn Adver. of Baltimore, Inc. v. Mayor & City Council*, 63 F.3d 1318, 1322 (4th Cir. 1995), *vacated on other grounds*, 518 U.S. 1030 (1996).

Permitting a jury to determine the scope of the FCLAA is not a mere "misapplication" of *Cipollone* and its progeny. It is instead a gross dilution of the Congressional policy underlying the statute. The preemptive scope of the FCLAA is governed entirely by Congressional intent. *See Cipollone*, 505 U.S. at 516-17. Congress's intent in enacting the FCLAA was to impose uniform warning obligations with respect to cigarette advertising and promotion. *See* 15 U.S.C. § 1331. By leaving the FCLAA's construction to the jury, the Florida Supreme

Court enabled that jury to vitiate Congress's policy of nationally-uniform warning obligations by imposing additional warning requirements with respect to cigarette advertising and promotion after July 1, 1969. This violation of Congressional intent and, indeed, the Supremacy Clause, is not simply a misapplication of a well-settled rule of law. Rather, the Florida Supreme Court's decision effectively tramples on long-standing federal policy set out in the FCLAA, and in so doing "conflicts with [a] relevant decision[ ] of this Court" (Sup. Ct. R. 10(c)), namely, *Cipollone*.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition for a writ of certiorari, the petition should be granted.

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